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Liability of Collecting Bank Where Checks Stolen, Forged and Cashed Before Delivery to Payees

The manager of a brokers' office who stole, forged and cashed checks payable to brokers' customers to whom checks were to be delivered by such manager was not an agent of the payees, and hence payees' assignee could not recover from collecting bank which cashed the checks. There could be no recovery on the theory that payees could ratify collection of checks from drawee bank by collecting bank and thus hold it liable for money had and received since there was nothing that payees could ratify so as to effectually make delivery of the checks to the manager by the brokers a delivery to the payees. Jones v. Bank of America Nat. Trust & Savings Association, District Court of Appeal, Cal., 121 Pac. Rep. (2d) 94.

One Davies was manager of the branch office of a brokerage firm. Customers in that office placed securities there for sale, and Davies forwarded them to the main office. The securities were sold by the main office at which the proper officers drew checks payable to the order of the respective customers for the net proceeds of the sales and sent the checks to Davies at the branch office for delivery to such customers. Instead of delivering the checks to the customers, Davies stole them, forged the indorsement of the payees in blank, added his indorsement, and deposited the checks in his bank account in a branch of defendant bank, which received the checks in good faith and without notice of any infirmity in Davies' title. Thereupon defendant bank forwarded such checks to the

NOTE — For similar decisions see Banking Law Journal Digest (Fifth Edition) §383.

drawee bank, and collected the proceeds thereof, which it paid to Davies in due course.

In determining whether an assignee of the payees of the checks cashed by the defendant bank could recover the amount of the checks from defendant bank on the theory that payees could ratify collection of checks from drawee bank by defendant and hold it as for money had and received, it was held that since there was no delivery of the checks to the payees the checks remained the property of the drawer, thus making inapplicable the theory of ratification. The manager of the office branch was not an agent of the payees and therefore there was nothing that payees could ratify so as to effectually make delivery of the checks to the manager by the brokers a delivery to the payees. The assignment was not made until the payees who were drawer's customers had been paid in full by drawer's surety, at which time it was too late for them to effect a ratification of delivery of the checks. Moreover, the payees never had a cause of action against defendant bank because of non-delivery of the checks to them or anyone in their behalf and hence had nothing to assign to the surety company or its agent.

The following paragraphs are quoted from the court's opinion:

This is an appeal by defendant bank from an adverse judgment arising out of the cashing of a number of checks by such bank upon which the signatures of the persons named therein as payees had been forged by one Davies, who was an office manager of the brokerage firm which drew the checks. At the time of the misconduct of Davies there was in effect an agreement between the brokerage firm and Ocean Accident and Guarantee Corporation, Ltd. (hereinafter referred to for convenience as the surety company), under the terms of which the latter agreed to reimburse and indemnify the brokerage firm, employer of Davies, for any loss occasioned the employer through embezzlement, etc., on the part of its employee, Davies.

The facts germane to a determination of this controversy are that the brokerage firm, Bennett, Richards & Hill, had its main office in Los Angeles and maintained a branch office in the city of Long Beach. We shall hereafter refer to the brokerage firm as the brokers. Davies was manager of the brokers' Long Beach office. Customers in that office placed securities there for sale, and Davies forwarded them to the Los Angeles office. The securities were sold by the last-named office

and the proper officers at Los Angeles drew checks payable to the order of the respective customers for the net proceeds of the sales and sent the checks to Davies at the Long Beach office for delivery to such customers. Instead of delivering the checks to the customers, Davies stole them, forged the indorsement of the payees in blank, added his indorsement, and deposited the checks in his bank account in a branch of defendant bank in Long Beach, which bank received the checks in good faith and without notice of any infirmity in Davies' title. Thereupon defendant bank forwarded such checks to the drawee bank, Citizens National Trust and Savings Bank of Los Angeles, and collected the proceeds thereof, which it paid to Davies in due course.

There was one check, which forms the basis of the fourth cause of action, which differed from all the others in this: The customer had deposited the stock certificate of a corporation called Buffums' with Davies to be sold by the issuing corporation, which, as a service to its stockholders, handled such transactions. Buffums' sold the stock and sent to Davies a check for $1,950, payable to the customer, one Minnie Butler. That check was drawn on the account of Buffums' in the same branch of defendant bank where Davies maintained his account. The last-named bank cashed that check in good faith on Davies' forgery of the payee's name and paid the amount thereof to Davies.

When Davies' thefts were discovered, the brokers immediately notified the surety company. Thereupon the brokers and the surety company entered into a written agreement which provided that "instead of following the usual procedure covering the payment of claims arising under such bonds," the officers of the brokers and the surety company would confer together with a view to arriving at a settlement direct with the customers, and that "such settlement shall be considered the payment of a direct loss sustained by Bennett, Richards & Hill under said bonds and in diminution of said bonds." The customers were thereafter interviewed by an adjuster of the surety company and an agent of the brokers, and claims were prepared for filing by the customers against the brokers. In each case the claim was for money alleged to be due from the brokers to the customer. The surety company thereupon paid to each customer the amount of his or her claim against the brokers and took from each of such customers an assignment of his or her claim against defendant bank. Simultaneously therewith the customer executed a release to the brokers.

The plaintiff herein is the claims manager of the surety company which executed the agreement under which the losses were indemnified. It was stipulated at the trial that the surety company paid the consideration for the assignments which it took from the customers and will receive any net recovery that is had.

The complaint proceeds upon the theory that the checks were issued to the several payees and when their respective checks were

collected by the bank as the same were deposited by the faithless office manager of the brokers, who had no authority to receive or indorse the same, such payees could ratify the collection of the checks from the drawee bank by the collecting bank and hold the latter as for money had and received. All causes of action except the fourth are identical, and are based upon checks drawn by the brokers. The fourth cause of action is based upon the check drawn by Buffums' upon defendant bank and delivered to the brokers for the payee thereof.

The answer denied that the checks were ever issued, such denial being based upon the theory that with the exception of the Buffums' check, by reason of claimed non-delivery to the payees, such payees never had any interest in the checks, were not therefore damaged by what defendant bank did, and consequently never had a cause of action to assign. The answer also pleaded that the settlement made by the surety company was in fact payment of a loss sustained by the brokers covered by the bond. The answer also pleaded a release, on the theory that if the bank was a wrongdoer in converting the checks, assuming such checks did become the property of plaintiff's assignors (the payees thereof), the brokers, by and through the wrongful act of their agent, Davies, became joint converters and were also released.

As to all causes of action of the complaint other than the fourth the trial court found that on the dates alleged the defendant bank received to and for the use of each payee named the amounts of the respective checks. As to the fourth cause of action it was found that without any authority from the payee of the check therein mentioned defendant bank cashed the same and paid the proceeds thereof to Davies, who had forged the payee's name thereto; that defendant bank had therefore received the amount named in said check from the drawee bank to and for the use and benefit of the payee named in the check. Judgment went for plaintiff against the defendant for the total amount of the checks in question.

Appellant's first ground of appeal is that all of the checks except the one issued by Buffums' were never in fact issued, but were stolen by the drawer's manager while still undelivered in the hands of the drawer, by reason of which, it is asserted, the intended payees of such checks never actually became the payees or owners thereof and never had any interest in them; that as there was no agency between Davies and the payees, the latter could not ratify the receipt of the checks by Davies as a delivery to them.

Because the two classes of checks here involved are governed by different legal considerations, we shall first discuss the group of checks involved in all causes of action except the fourth. The brokers had sold securities belonging to their customers. Whether such sales were authorized by the customers does not appear, but the record does disclose that in some of the cases the thefts by Davies of the proceeds of

such sales were concealed for years, which fact would seem to warrant the inference that in some instances at least the customers were without knowledge that the securities had been sold or that any checks were drawn by the brokers to their order. Section 3097 of the Civil Code provides: "Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. As between immediate parties, and as regards a remote party other than a holder in due course, the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, accepting or indorsing, as the case may be; and in such case the delivery may be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring the property in the instrument. But where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed. And where the instrument is no longer in the possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved."

In the case at bar, if there was no delivery of the checks to the customers, then they remained the property of the brokers. Garthwaite v. Bank of Tulare, 134 Cal. 237, 66 P. 326. In People v. Cassou, 27 Cal. App. 23, 148 P. 810, the defendant was charged with the felonious taking of personal property in violation of section 532 of the Penal Code. The information filed charged him with having induced the indorser on a note, by means of false pretenses, to make and deliver a certain promissory note to him. From the allegations of the information it appeared that the defendant charged therein was himself the maker of the note and there was no averment that the instrument had ever been delivered to the payee. A demurrer to the information on the ground that it did not state facts sufficient to constitute a public offense was sustained by the trial court, and such ruling was upheld on appeal, where the court said: "Neither the note nor the indorsement thereon had any legal existence until delivered to and accepted by the payee." It was accordingly held that because of non-delivery to the payee, the indorser had no interest in the note and the pleading charged the defendant with nothing more than procuring the indorser's signature to the note by false pretenses.

In support of his claim that his assignors as payees on the check had a right of action against the collecting bank, respondent strongly relies upon the case of George v. Security Trust & Savings Bank, 91 Cal. App. 708, 267 P. 560, wherein the facts were substantially that one Lynch drew his check to the order of one Vanderbilt and gave it to Allen, who had no authority to receive or indorse the same. The drawee bank accepted and certified the check. Allen thereupon forged

the payee's name and passed the check to one Cohen; the latter collected the amount thereof from the defendant bank, which in turn collected such amount from the drawee bank. It is true, as contended by respondent, that the court there held that a cause of action was stated against the bank upon the theory of ratification by the payee of the collection of the check from the drawee and that the collecting bank could be held as for moneys had and received; that the payment by the drawee bank to the collecting bank with the forged indorsement thereon is evidence that the check was accepted and paid by the drawee bank, which acts the payee ratified. It is noteworthy, however, that in all the cases relied upon by the court in the cited case the facts were that delivery of the negotiable instrument had been made to the payee thereon. Such also was the fact in the cases of Palo Alto, etc., Ass'n v. First National Bank, 33 Cal. App. 214, 164 P. 1124; Buena Vista Oil Co. v. Park Bank, 39 Cal. App. 710, 711, 180 P. 12, and Walsh v. American Trust Co., 7 Cal. App. 2d 654, 47 P. 2d 323. True, the court in the George case stated that the maker of the check did not deliver it to the payee thereof, but to Allen, "who had no authority to receive or indorse the same." However, in that case there had been a delivery of the check by the drawer, presumptively made, as is stated in section 3097 of the Civil Code, "for the purpose of giving effect thereto." Where there has been such a release or delivery of the check by the maker, we can readily understand how equitably and legally the defrauded payee might elect to sue the bank, thereby ratifying the receipt of the check by the bank from the forger. This for the reason that after delivery of the check has been made with the intent and purpose of giving effect thereto and it falls into the hands of an unauthorized person, the rightful payee may charge the bank with having received it as an agent for the use and benefit of the payee and as having dealt with the check as the property of the true payee and therefore bound to pay the proceeds only to him or his order. In other words, under such circumstances the collecting bank holds the funds obtained upon the check for and on behalf of the true owner thereof, and the bank's payment of such funds to the party who committed the forgery or to any person other than the true owner does not discharge its obligation. But in the case with which we are here concerned the checks never left the custody, possession or control of the makers. The brokers' manager, Davies, was their agent and employee. He stole the checks while they were yet within the custody and control of the employers. He was neither ostensibly nor in fact the agent of the payees. Had the checks been transmitted by the brokers to the payees and delivery miscarried, thereby resulting in the checks falling into the hands of one unauthorized to receive them, but who fraudulently indorsed and collected them from the bank, the situation might be different.

So far as ratification is concerned, it is the rule in California that a "ratification can only be effectual between the parties, when the act is done by the agent avowedly for or on account of the principal, and not when it is done for or on account of the agent himself, or of some third person." Watkins v. Clemmer, 129 Cal. App. 567, 19 P. 2d 303, 305. Furthermore, in Schomaker v. Petersen, 103 Cal. App. 558, 570, 285 P. 342, 347, it is said: "And ratification is effectually implied only in respect of an act done by a person professedly acting as the agent of the party sought to be charged as principal." By no stretch of the imagination can it be made to appear that Davies, the branch manager of the brokers, who stole, forged and cashed the checks, was even pretending to act as agent of the payees of the checks. Consequently there was nothing that the payees could ratify so as to effectually make the delivery to Davies a delivery to them.

In the instant case the assignment was not made until the payees on the checks as customers of the brokers had been paid in full for their claims against such brokers. In other words, the customers stood upon their claims against the brokers until they were paid. Therefore, whatever cause of action the customers might conceivably have against the bank reverted to the brokers, who caused the claims against them to be satisfied. When the customers had been paid their respective claims it was too late for them to effect a ratification of the delivery of the checks; and after payment of their claims the customers were left without a claim against any one.

We shall not discuss the question of subrogation, for the reason that respondent disclaims the existence of the doctrine in the instant litigation; and, as we have heretofore indicated, the customers under the facts of this case had no cause of action against the bank because of non-delivery of the checks to them or anyone in their behalf. Their sole claim was against the brokers. As heretofore stated, they stood upon that claim and obtained payment of the same against the brokers in full. The equitable doctrine of subrogation would not aid the surety company under the facts of this case. Meyers v. Bank of America Nat. Trust & Savings Ass'n, 11 Cal. 2d 92, 77 P. 2d 1084. Almost universally it has been held that the doctrine of subrogation does not apply in favor of a surety company on a fidelity bond against persons who did not participate in the wrongful act of the wrongdoer. Here neither the bank nor the surety company were wrongdoers, but the surety company was required to make good the losses suffered by the brokers under a contractual liability for the assumption of which the surety company was paid a premium. Under such conditions equity will not permit the application of the doctrine of subrogation to compel the bank, admittedly an innocent party, to bear the loss.

So far as the causes of action other than the fourth are concerned, we therefore hold that while the payees on the checks, as customers

of the brokers, had a cause of action against the latter which they settled, there never existed under the facts here presented a cause of action against the defendant collecting bank. Consequently such payees had nothing to assign to the surety company or its agent.

We come now to a consideration of the check involved in the fourth cause of action of the amended complaint. As heretofore in this opinion narrated, this check was drawn by Buffums' upon the defendant bank and was paid to Davies by a branch of such bank on the forged indorsement of the name of Minnie Butler, the payee. The question of delivery of the check is not involved. As found by the trial court, Minnie Butler had left her Buffums' stock with Davies, the manager of the brokers' Long Beach office. Buffums', as a service to its stockholders, handled the sale and purchase of its securities. After the receipt by him of Minnie Butler's stock, Daives sent the same to Buffums', who sold it as directed and forwarded the brokers their check for $1,950 payable to Minnie Butler. Forging her name to the check, Davies presented it to defendant bank's branch, upon which it was drawn, received payment thereon, and the bank charged the amount thereof to the account of Buffums'. In this case the check was delivered to the brokers as agent for Minnie Butler, and she therefore became the payee thereof. In connection with the checks heretofore considered, defendant bank was the collecting bank and admittedly received the money upon the checks it cashed, but in the case of the Minnie Butler check the drawee bank did not receive any money. It paid the check, and upon its books erroneously charged the amount thereof against the account of its depositor, Buffums'. That such depositor had a cause of action against the bank for erroneously paying out its funds on deposit cannot be denied; but the question presented to us is whether a drawee bank is liable to the payee of a check whose indorsement thereon has been forged and when payment thereon has been made by the drawee bank upon such unauthorized indorsement. We are convinced that it is firmly established as the law that the payee of a check unaccepted, as was the case here, cannot maintain an action upon it against the bank on which it is drawn. Such holding is based on the principle that there is no privity between the drawee bank and the payee of the check. In the instant case the bank's contract was only with the drawer of the check, Buffums'. The bank never received any money from Minnie Butler; it had no money belonging to her, and never promised to pay her anything. It received money on deposit from Buffums', and its agreement with the latter was that it would return the same to Buffums' when called for or would pay it out upon Buffums' checks. For its failure of duty in this regard by not paying the money to Minnie Butler, the payee, the bank was responsible to its depositor, by reason of its contract with such depositor, but was not responsible to

Minnie Butler or anyone else. When the check was not paid to Minnie Butler, the obligation of Buffums' to her was not impaired by the issuance of the check, and she was still entitled to demand her money from her debtor. Therefore Minnie Butler, as the payee of a check unaccepted by her, cannot maintain an action for it against the bank on which it was drawn. This was the conclusion reached by the Supreme Court of the United States in First National Bank of Washington v. Whitman, 94 U. S. 343, 24 L. Ed. 229. The case of George v. Security, etc., Bank, supra, relied upon by respondent, is not controlling here, for the reason that the action there was against a collecting bank, and not, as here, a drawee bank.

From the foregoing it follows that defendant bank being without fault, and plaintiff's assignors having nothing to assign, plaintiff cannot prevail in his action against the appellant bank.

For the reasons herein stated, the judgment is reversed and the cause remanded with directions to the court below to enter judgment for the defendant.

Correspondent Bank Entitled to Set Off Proceeds of Check Upon Failure of Collecting Bank

Where payee deposited check drawn on New York trust company, with Florida bank which forwarded the check to New York correspondent which collected check and gave final credit to Florida bank as of close of business on June 9, 1930, the result was that the agency of the correspondent and the bank had terminated and a "debtor and creditor relationship" between the payee and the Florida bank ensued as of June 9. In consequence, the correspondent bank was entitled to set off the proceeds of the check as against the general indebtedness of the Florida bank to the correspondent, upon the insolvency of the Florida bank on June 11. Leonardi v. Chase National Bank of City of New York, Supreme Court, Appellate Division, 33 N. Y. Supp. (2d) 706.

In this case a check for $3,750 made to the order of plaintiffs and drawn on the Bank of Manhattan Trust Company, of New York, hereinafter referred to as the trust company, was deposited on June 6, 1930, by plaintiff Florence Leonardi

NOTE—For similar decisions see Banking Law Journal Digest (Fifth Edition) §164.

with the Bank of Bay Biscayne, of Miami, Florida, hereinafter referred to as the bank, with this indorsement: "For deposit of Florence Leonardi & John Leonardi." Plaintiffs had an account with the bank which at the time showed a credit balance of $54.50. This check, together with others, amounting in all to the sum of $27,147.68 was mailed by the bank to defendant, its New York correspondent, with a "cash letter" dated June 6, 1930, containing the printed notation:

"We Enclose Cash Items for Collection and Credit.

"All items listed in this letter to be handled as Cash unless otherwise instructed.

"Items $10.00 and under No Protest. Do not protest items bearing this stamp or similar authority of preceding indorser. Telegraph Non-Payment of Items $500.00 and over."

This letter, with its contents, was received by defendant at 12:05 a. m. on June ninth. The check cleared through the 8 a. m. exchanges to the trust company, and sometime before 11 a. m., the account was credited the bank by the defendant.

After the close of business on the following day, June tenth, the bank, being insolvent, failed to open its doors, and was taken over by the Comptroller of the State of Florida, on the 11th day of June, 1930, and is now being liquidated under and by virtue of the laws of the State of Florida.

The bank owed defendant over one million dollars. Defendant learned of the insolvency on June eleventh, at which time it set off as against this indebtedness the credits to the bank on its books in the sum of $257,488.18, inclusive of that represented by plaintiff's check. In an action to recover against defendant on the ground that, by so setting off the indebtedness, it converted the proceeds of the check, which plaintiffs claim belong to them, it was held that defendant was entitled to set off proceeds of the check as against the general indebtedness of bank to defendant. In its opinion, the court wrote:

The issue here presented is whether or not, at the time defendant set off the credit to the bank on its books, as of June eleventh, a relationship of debtor and creditor existed between the bank and plaintiffs with respect to the amount of the check, in so far as concerns

collection of the check and actual final payment thereof by defendant to the bank. If so, the status of plaintiffs is no different from that of all other depositors who relied on the credit of the bank; if not, defendant set off monies entrusted to it as collecting agent not only of the bank but of plaintiffs themselves, and so converted them.

The transaction is governed by the provisions of the Compiled General Laws of the State of Florida, § 6834, to the effect that, when a check is deposited in a bank for credit or for collection, it shall be considered due diligence on the part of the bank in the collection thereof to forward it without delay according to the regular course of business of banks, and such forwarding bank shall only be liable, except in case of want of due diligence, "after actual final payment is received by it. . . ." The contract between plaintiffs and the bank was made in Florida and was to be performed there. In Federal Reserve Bank of Richmond v. Malloy, 264 U. S. 160, 44 S. Ct. 296, 68 L. Ed. 617, 31 A. L. R. 1261, the Florida statute was held applicable in a case involving a deposit of a check in Florida and alleged negligence of a collecting bank without the state.

The parties are presumed to have contracted with reference to the Florida statute, the effect of which was to render defendant the sub-agent of plaintiffs in the collection of the proceeds of the check until actual final payment was made by defendant to the bank. Federal Reserve Bank of Richmond v. Malloy, supra; Dakin v. Bayly, 290 U. S. 143, 54 S. Ct. 113, 78 L. Ed. 229, 90 A. L. R. 999; Florida Power & Light Co. v. Newsom, 111 Fla. 154, 149 So. 621; Andrews v. First Nat. Bank of Tampa, 115 Fla. 67, 155 So. 143. No agreement between the bank and the defendant without the consent of plaintiffs could alter this relationship, but the effect of the statute "might be avoided by agreement or by clear and certain custom known to the depositor. . . ." Dakin v. Bayly, supra, 290 U. S. at pages 147, 148, 150, 54 S. Ct. at page 115, 78 L. Ed. 229, 90 A. L. R. 999. In Florida Power & Light Co. v. Newsom, supra, 111 Fla. at page 161, 149 So. at page 624, it is stated with respect to the statute that "it may be that such owners [of negotiable paper] could waive its application. . . ."

While the language of the pass book issued by the bank to plaintiffs reiterates the effect of the statute, namely, that defendant until final actual payment remains the agent of plaintiffs for collection, the deposit slip used by plaintiffs in depositing the check with the bank contains the statement that "All items are credited subject to final payment in cash or solvent credits." The clear implication of this agreement, pursuant to which the deposit was made, is that a credit provisionally given upon deposit becomes final when the item is collected and final payment by way of a solvent credit is received by the bank. The method by which such credit was established between

defendant and the bank upon collection of the item is obviously within the scope of the agency.

The undisputed proof is that final credit was given the bank by defendant as of the close of the business day of June ninth, in accordance with custom and the understanding of the banks, of which the cash letter is also evidence. Credit is the exclusive means of payment in ordinary banking practice. "The cash is not handled" and "No money passes." Here, the payment to the bank was by means of a final solvent credit, as the result of which the agency terminated and the relationship of debtor and creditor ensued between defendant and the bank. Commercial Bank of Pennsylvania v. Armstrong, 148 U. S. 50, 58, 13 S. Ct. 533, 37 L. Ed. 363; Jennings v. United States Fidelity & Guaranty Co., 294 U. S. 216, 219, 220, 55 S. Ct. 394, 79 L. Ed. 869, 99 A. L. R. 1248; People v. City Bank of Rochester, 93 N. Y. 582. "In effect, the situation was then the same as if the defendant, receiving the money in the capacity of agent, had handed it over to the principals, and had received it back at once to be retained as a deposit." Carson v. Federal Reserve Bank, 254 N. Y. 218, 230, 172 N. E. 475, 480, 70 A. L. R. 435.

In the absence of controlling Florida authority, we are of opinion that such credit established in favor of the bank was an actual final payment within the purview of the statute. Briggs v. Central Nat. Bank of New York, 89 N. Y. 182, 42 Am. Rep. 285; Matter of Bickford's, Inc., v. Broderick, 234 App. Div. 417, 255 N. Y. S. 241, affirmed In re Bickford's, Inc., 259 N. Y. 630, 182 N. E. 211; King v. Bowling Green Trust Co., 145 App. Div. 398, 401, 402, 129 N. Y. S. 977; cf. § 350-i, Negotiable Instruments Law. In any event, the parties were permitted to and did agree upon payment by means of credit.

The result was that the agency of defendant and the bank had terminated and the relationship of debtor and creditor between plaintiffs and the bank ensued as of June ninth. In consequence, the defendant was entitled to set off the credit as against the general indebtedness of the bank to it, as of June eleventh, in accordance with the agreement between them to that effect.

Plaintiffs' endorsement "For deposit" on the check was restrictive and indicated that the forwarding bank was an agent for collection and not owner of the item. Soma v. Handrulis, 277 N. Y. 223, 231, 232, 14 N. E. 2d 46. The operation of the statute achieved the same result. Pursuant to the endorsement, the check was deposited for collection and credit. When final payment was made by collection, the depositor became a creditor. Matter of Bickford's, Inc., v. Broderick, supra.

A case almost identical in its facts with the one we are now reviewing was decided by the Supreme Court of Tennessee. Dean Tobacco Warehouse Co. v. American Nat. Bank, 173 Tenn. 365, 117 S. W. 2d

746, 748, 118 A. L. R. 360. It was there held that payment by a final credit after collection was "as much so as if defendant on the morning of January 18 had paid the forwarding bank the proceeds of the check in cash. It follows that had the collecting bank subsequently become insolvent instead of the forwarding bank, the loss would have fallen upon the forwarding bank rather than upon complainant."

It is immaterial to the result that the vice-president of the bank, as testified to by plaintiff Florence Leonardi, informed plaintiffs that they were not to draw against the check for eight days. The debtor and creditor relationship ensued immediately upon collection and credit. If plaintiffs agreed not to draw against the account for some arbitrary period, such arrangement was extraneous to transition of the relationship of the parties by collection and credit.

In the light of the foregoing views we are constrained to disagree with the holding in Leonardi v. Chase Nat. Bank of City of New York, D. C., 11 F. Supp. 85, reversed on juirsdictional grounds 2 Cir., 81 F. 2d 19; certiorari denied 298 U. S. 677, 56 S. Ct. 941, 80 L. Ed. 1398.

Bank Not Liable on Forged Check Indorsement Where No Direct Loss Caused

A bank paying on a forged check indorsement, to person other than payee, breaches the promise implied in law to pay only at direction of depositor, giving rise to cause of action in favor of depositor against bank unless depositor is estopped by his own acts or omissions, or money paid on forgery has reached the payee for whom money was actually intended. Sweeney v. National City Bank of Troy, Supreme Court, Appellate Division, 33 N. Y. Supp. (2d) 885.

In this case a real estate agent was authorized to negotiate a sale of the owner's premises. In the course of his negotiations, the agent found prospective purchasers, a man and wife named Shay. After the Shays had agreed to buy the property for the sum of $10,000, the agent forged a deed running from the owner to them. A $6,000 loan was then negotiated with the Savings Bank. Behan, its attorney, took the forged

NOTE — For similar decisions see Banking Law Journal Digest (Fifth Edition) §580.

deed and the mortgage executed by the Shays, and caused them to be recorded. The Shays directed the Savings Bank to pay the $6,000 proceeds of the mortgage to Behan, which he deposited with the National Bank, and drew checks aggregating $652.83 to pay taxes, and the check in suit to the owner of the premises for the remainder of the fund, and delivered it to the agent, who forged the name of the owner as indorser, deposited it in the Watervliet Bank in which he had an account, received a cashier's check indorsed payable to the owner of the premises for $5,133.67 which he delivered to her, and retained $213.50 commissions to which he was entitled.

These proceeds, irrespective of the forgery, were received by the persons to whom Behan wished payments to be made. The cashier's check was delivered to the owner of the premises on the day she executed the genuine deed to the Shays and received the mortgage drawn by them for $4,000, which, with the proceeds of the check, made up the $10,000 purchase price, less the tax payments.

It was held that the National Bank paying the check was not liable to the attorney's assignee for the loss incident to the Savings Bank having its mortgage junior to mortgage executed to owner by the purchasers when they received the genuine deed from the owner, since such loss was caused primarily by the Savings Bank's failure to discover the forgery of the deed, and not by the National Bank's failure to discover the forgery of the indorsement on the check. In its opinion, the court said:

> Appellant National Bank argues that it has a defense because payment was made to the persons legally entitled to receive the money and to whom Behan intended that it should be paid. Sundail Const. Co. v. Liberty Bank of Buffalo, 277 N. Y. 137, 13 N. E. 2d 745; Lynch v. First Nat. Bank of Jersey City, 107 N. Y. 179, 13 N. E. 775, 1 Am. St. Rep. 803. Respondent was permitted to recover upon the theory that appellant's negligence in failing to detect the forgery of the Kennedy endorsement caused the long delay before exposure, thereby causing loss to Behan's client, the Savings Bank, it being assumed that disclosure of the facts on or shortly after April 23, 1931, would have permitted the Savings Bank to have bettered its position as the holder of a mortgage of questionable validity, and pos-

sibly for Behan to have stopped payment of his check or to have recovered the money from Kennedy. The measure of damage and the liability of appellant National Bank was fixed by the trial court in the same amount as though Behan had suffered loss through the payment of his check to persons not legally entitled thereto. The Savings Bank suffered the loss incident to having a mortgage junior to the Kennedy mortgage, through its negligence and failure to ascertain that O'Connell had forged the name of Kennedy to the deed dated April 17. The only basis for argument that appellant was in any way liable therefor is that the Savings Bank might have received notice of its own negligence and have been given an opportunity to recoup had appellant, National Bank, detected the forged endorsement on Behan's check to Kennedy. This is speculative and tortuous. O'Connell's motive for forging the Behan check to Kennedy is not clear. Had he delivered it, she would have paid his commissions therefrom. The fact that what she believed to be a cash payment made by the Shays came in the form of a check from Behan would not have disclosed the source of the money or that there was a forged deed. O'Connell was the only person with knowledge who was present at the time of the closing of the genuine transaction, as the Shays assumed that they were to obtain a deed of the premises by giving two mortgages and without a cash payment.

The appellant National Bank was the debtor of Behan and, under its obligation as a depository, was required to pay out his funds as he directed. Under the ruling of the trial court, it is held responsible for a loss to Behan's client, caused primarily by the client's negligence in failing to discover O'Connell's forgery of the deed, and not because of its failure to discover the forged endorsement on the check.

Behan suffered no damage. His assignee has no cause of action against appellant. Sundail Const. Co. v. Liberty Bank of Buffalo, supra; Lynch v. First Nat. Bank of Jersey City, supra; Yanowe & Co., Inc., v. American Exchange Irving Trust Co., 226 App. Div. 530, 234 N. Y. S. 603.

Judgment reversed on the law and facts, with costs, and complaint dismissed, with costs.

The court makes the following finding of fact: That the primary cause of loss of plaintiff's assignor's client, the Savings Bank, was the latter's negligence in failing to discover that the deed dated April 17, 1931, was a forgery, and the negligence of appellant in cashing the check with the forged endorsement did not make it legally responsible for the secondary negligence, if any.

In a concurring opinion, the court said:

The relationship between Behan and the defendant was that of debtor and creditor. After Behan deposited moneys in his account,

the title to those moneys passed to the appellant bank and the bank became Behan's debtor for the amount of the deposits so made. This principle is so well established that it does not require citation.

Arising from the debtor and creditor relation, the law fixes a contractual duty on the bank, by implying a promise from the bank to its creditor-depositor, that the bank will pay only in exact conformity with the depositor's directions. Critten v. Chemical National Bank, 171 N. Y. 219, 63 N. E. 969, 57 L. R. A. 529; Seaboard National Bank v. Bank of America, 193 N. Y. 26, 85 N. E. 829, 22 L. R. A., N. S., 499; Crawford v. West Side Bank, 100 N. Y. 50, 2 N. E. 881, 53 Am. Rep. 152.

It necessarily follows that when payment is made by the bank upon a forged endorsement to one other than the payee named, the bank has breached the promise implied in law to pay only at the direction of the depositor. Shipman v. Bank of State of New York, 126 N. Y. 318, 27 N. E. 371, 12 L. R. A. 791, 22 Am. St. Rep. 821; Kobre v. Corn Exchange Bank, 79 Misc. 212, 139 N. Y. S. 890.

On the facts as heretofore set forth, the defendant-appellant has breached that promise, and when the rigid rule of law as set out above is applied to the situation a cause of action arises.

However, the defendant-appellant contends that, since the payee actually intended by the drawer has in fact been paid the full amount, a complete defense to this action is raised under the facts of this case. I am in accord with this contention. The law has recognized certain equitable defenses to the strict legal liability of a bank paying on a forged check. Shipman v. Bank of State of New York, supra, is one of the leading cases in this field, and the able briefs of counsel for both sides devote much time and thought to it. I understand the rule in the Shipman case to be that the bank is held on its promise to its depositor unless the depositor is estopped by his own acts or omissions, or unless the bank can show that the money which it paid on the forgery reached the payee for whom it was actually intended. As I interpret that decision, if it could be shown that the funds which the forger made good to the payee could be traced to the defendant-bank, the basis for an equitable defense to the legal liability of the bank is established.

This tracing is, of course, entirely a matter of proof. The principle upon which the defense is based is undoubtedly to prevent the depositor from being unjustly enriched by collecting from his creditor-bank the sum which has, in fact, reached the payee to whom the depositor intended the fund to go.

The plaintiff-respondent's brief argues that a benefit must be shown to the drawer or expense on the drawee in addition to showing payment to the payee intended. They rely on the language of the Shipman case for their contention that this benefit or expense must be shown and they further state that it must be pleaded. It was not

pleaded in the Shipman case, nor did the Court indicate that such pleading was required.

I feel that the question of intention of the drawer is the controlling factor. Here the drawer intended that Kennedy receive this fund. To satisfy that intention, he drew a check to her order. Somewhat belatedly, she actually did receive that which Behan had intended her to have. Therefore, Behan cannot now claim against this defendant.

Let us suppose that Kennedy herself had actually endorsed and cashed this check. Surely, that money under the facts as presented to us could not be recovered from her now, nor would this action against the bank lie in spite of the fact that the savings bank suffered loss at the hands of the forger O'Connell on the forged deed.

For that reason I regard the loss to the Troy Savings Bank as foreign to this cause of action on a simple forgery of a check, and I think it is immaterial whether or not the savings bank, at the time the amendment to the complaint was suggested by the Court, did or did not come in.

In the Shipman case [126 N. Y. 318, 27 N. E. 374, 12 L. R. A. 791, 22 Am. St. Rep. 821], the Court said, "As it was not shown that such payment was made at the expense or to the injury of the defendant, or that the plaintiffs profited by it [beyond their whole loss], the cause of action stated in the complaint was not affected by the fact." The fact there referred to, in my opinion, was the fact that there was no evidence that the money which the forger had procured by his fraud ever reached the payee intended. Here, the payee has received the money procured by the forger's fraud and not for that reason, I believe that that defense standing alone is a bar to this action.

BANKING DECISIONS

In this department are published each month all of the important decisions of the Federal and State Courts, involving questions pertaining to the law of banking and negotiable instruments.

LIABILITY OF BANK FOR ACTS OF PRESIDENT

State ex rel. Clarke, Superintendent of Banks, v. Ripley Savings Bank & Trust Co., Court of Appeals of Tennessee, 160 S. W. Rep. (2d) 189

Knowledge of an agent acting in his own private interest will be imputed to his principal where the agent is the sole representative of the corporate principal in the transaction.

In this case the secretary-treasurer of a corporate depositor was also the bank's president. As an officer of the corporate depositor he had general charge of its business operations and had authority to draw checks on its bank account for ordinary business purposes, but not for his personal use. It was shown that four checks were all drawn by the secretary-treasurer of the corporate depositor and charged to its account and the proceeds thereof were appropriated by him for his own use. No other officer of either the corporate depositor or the bank had any part in the transaction or any knowledge of any irregularity therein. It was held that the knowledge of the bank president of his own fraudulent conduct was imparted to the bank and the bank was required to make good the loss.

Suit by the State of Tennessee, on relation of H. B. Clarke, Superintendent of Banks, against Ripley Savings Bank & Trust Company for liquidation of the defendant as an insolvent bank, wherein the Ripley Land Company intervened, bringing in the Federal Deposit Insurance Corporation as a defendant. From a decree dismissing the intervening petition, the intervenor appeals.

Reversed and decree entered in favor of intervenor.

W. N. McKinney and J. D. Mosby, both of Nashville, for appellant Ripley Land Co.

Steele & Steele, of Ripley (James E. Markham and Carl A. Landis, both of Washington, D. C., of counsel), for H. B. Clarke and Federal Insurance Corporation.

NOTE — For similar decisions see Banking Law Journal Digest (Fifth Edition) §1078.

KETCHUM, J.—This is an appeal by the Ripley Land Company from a decree dismissing its intervening petition filed against the receiver of the Ripley Savings Bank & Trust Company and the FDIC in the suit of R. B. Clarke, superintendent of banks, against the Ripley Savings Bank & Trust Company for the liquidation of the assets of said bank as an insolvent institution.

The said Ripley Savings Bank & Trust Company had been engaged in a general banking business in the town of Ripley for thirty-six years prior to its failure which occurred on April 24, 1939; and the Ripley Land Company, a corporation engaged in farming operations, had been a depositor in said bank for many years prior to its failure.

G. M. Partee was first cashier and later president of said bank from the time of its organization and was its chief executive officer. He was also secretary and treasurer and the manager of the Ripley Land Company and had general charge of its business operations and had authority to draw checks on its bank account for ordinary business purposes, but not for his personal use.

The Federal Deposit Insurance Corporation, referred to as the FDIC, was made a defendant to the petition by reason of a contract it had with the Ripley Savings Bank insuring its depositors in accordance with the provisions of the Act of Congress of August 23, 1935. 12 U. S. C. A. § 264.

The petitioner's claim is based upon five checks drawn by the said G. M. Partee on the account of the Ripley Land Company, amounting in all to $2,700, and paid by the bank and charged to the Land Company's account. The first four checks, aggregating $1,700, were all handled by Mr. Partee without the assistance or knowledge of any other officer or representative of the bank and will be considered together in one group. The fifth check, for $1,000, was drawn under different circumstances, and the president, cashier and assistant cashier all participated in the transaction, and this check will be discussed separately.

The four checks were all drawn by Partee on the account of the Ripley Land Company and charged to its account and the proceeds thereof were appropriated by Partee for his own use, and are described as follows:

(1) A check for $300, dated July 24, 1937, payable to Partee, or bearer, signed by the Ripley Land Company and endorsed by G. M. Partee.

(2) A check for $600 of date December 29, 1937, payable to G. M. Partee, or bearer, and having no endorsement.

(3) A check for $500 of date March 8, 1938, payable to Partee & Miller or bearer, and having no endorsement.

(4) A check for $300 of date December 31, 1938, payable to G. M. Partee, or bearer, and having no endorsement thereon.

The proceeds of these four checks, aggregating $1,700, were appropriated by Partee to his own use, and no other officer of either the Land Company or the Bank had any part in the transaction or any knowledge of any irregularity therein. Mr. Partee in his deposition admits that he had no authority to draw the checks for his personal use, that he converted the money to his own use, that the transactions were handled by himself alone, as the representative of the bank, and that no other officer or agent of the bank had any part therein.

Under these facts, which are not disputed, we think the case is controlled by the ruling of Smith v. Mercantile Bank, 132 Tenn. 147, 150, 177 S. W. 72, and that class of cases which hold that the knowledge possessed by the agent, although acting in his own private interest, will be imputed to his principal, where the agent is the sole representative of the corporation in the transaction. See People's Bank & Trust Co. v. Potter, 156 Tenn. 649, 653, 4 S. W. 2d 341; Barry v. Hensley, Adm'r, 170 Tenn. 598, 604, 98 S. W. 2d 102; 2 Am. Jur., "Agency," § 380, page 300; Brookhouse v. Union Publishing Co., 73 N. H. 368, 62 A. 219, 2 L. R. A., N. S., 994, 111 Am. St. Rep. 623, 6 Ann. Cas. 675.

In First National Bank v. Burns, 88 Ohio St. 434, 103 N. E. 93, 95, 49 L. R. A., N. S., 764, 769, the supreme court of Ohio, in a well considered opinion, say that there is no need of the agent's communicating the knowledge he has to his principal in such cases, because the principal, in law, is already conclusively presumed to have that knowledge; and the court says:

"The principal's liability does not depend upon the agent's duty to communicate, or the likelihood that he will communicate, his knowledge to the principal, but upon the fact that the agent is the alter ego of the principal, acting for the principal, and knows that his acts and knowledge ipso factor become the knowledge and acts of the principal."

In that case the bank sued the Burnses on certain notes which they had executed to Julius Boesel. The defense was that the notes were obtained by Boesel by fraud and without consideration, and that the bank had knowledge of the fraud and want of consideration at the time the notes were transferred to it, and, therefore, was not an innocent holder. The only knowledge that the bank had of the fraud and the want of consideration was the knowledge that Boesel had. Boesel was the president and active manager of the bank, and sold the notes to the bank, and in doing so he acted for himself personally, and also for the bank in purchasing the notes; and no other officer or person connected with the bank had anything to do with the transaction. In holding that the bank was charged with Boesel's knowledge of the fraud the court said that "Boesel, as manager of the bank cannot unknow what Boesel the man all the while knew." And in conclusion it was said that "To hold otherwise would open the widest possible door for all sorts of

fraud; the more atrocious and aggravated the fraud, the less the likelihood of fixing the liability upon the principal. Why? Because the agent would be the less likely to communicate the fact to the principal. Such a holding has no place in sound business or good morals and ought not to be encouraged by our courts."

With respect to these four checks the chancellor based his decree upon the finding that Partee was the secretary-treasurer and manager of the Land Company, with authority to draw checks upon its account, and that the bank was not required to see to the proper application of the proceeds of such checks. And he was of opinion that the case was governed by the recent ruling of this court and the supreme court in a memorandum opinion denying a writ of certiorari in the case of City Gas & Service Station et al. v. Frank S. Taylor et al., Lake Equity Docket. Without reviewing the facts of that case, it is sufficient to say that it is readily distinguishable in very material respects from the case at bar, and from the cases of Smith v. Mercantile Bank, supra, and Barry v. Hensley, Adm'r, supra, and People's Bank & Trust Co. v. Potter, supra, which we think are controlling here. The Mercantile Bank and the Hensley cases are discussed in the Gas & Service Station case, and are said to be readily distinguishable in the material facts, and the decision was predicated mainly upon the ground that if the complainant, as the surviving partner of Hardison, the wrongdoer, was granted a recovery, he would have to account to Hardison's estate for a half of it, the mere suggestion of which was said to be shocking to the court.

We think this feature of the case falls within the qualification of the exception to the general rule with reference to imputed notice, so as "to bring within the general rule which charges the principal with the knowledge possessed by the agent, cases where the officer, though he acts for himself, or for a third person, is the sole representative of the corporation in the transaction in question." Smith v. Mercantile Bank, 132 Tenn. 147, at page 150, 177 S. W. 72, at page 73.

We think, therefore, that the chancellor was in error in denying the petitioner's claim with reference to these four checks. The checks amounted to $1,700. Mr. Partee restored to petitioner's account the sum of $325 and paid for it certain tax items, amounting to $150.93, leaving a balance of $1,224.07 owing to the Land Company, for which amount the petitioner is entitled to a decree.

The $1,000 check involves a different state of facts. This check was drawn by Partee on the account of the Ripley Land Company in favor of Partee Insurance Agency on January 13, 1939, was paid by the bank on that date, and bore a stamped endorsement on the back, "Credit to the account of the within payee, Ripley Savings Bank & Trust Co." The amount was not in fact credited on the account of the

Partee Insurance Agency in the bank, but was applied on certain debit memoranda against the Insurance Agency in excess of $1,000 which were being carried as cash items in the bank's cash drawer. These debit charges were for cash advances made by the bank to insurance companies in payment of obligations of the Partee Insurance Agency for premiums due. By reason of these debit memoranda, the Partee Insurance Agency was overdrawn in the bank in excess of $1,000. So the Partee Insurance Agency received the benefit of the $1,000 represented by this check. The Partee Insurance Agency was a partnership firm composed of G. M. Partee, W. Dan Majors and W. I. Stewart, who were president, cashier and assistant cashier, respectively, of the bank. This $1,000 transaction was known to and actively participated in by Partee, Majors and Stewart.

Contemporaneously with the issuance and payment of this check on January 13, 1939, there was placed in the cash box of the bank a deposit slip indicating a deposit of $1,000 by the Ripley Land Company on that date, but no deposit was actually made by the Ripley Land Company on that date. This deposit slip was written in the handwriting of W. I. Stewart, assistant cashier of the bank, and was carried as a cash item to offset the $1,000 check charged to the Ripley Land Company on that date.

The bank suspended business on April 24, 1939, and was taken over by the superintendent of banks as of that date. The audit showed that there was a shortage of cash of $79,590.52 as of that date as evidenced by credit memoranda and deposit slips in the cash box of the bank which were being counted as cash. These items, including the $1,000 deposit slip in the name of the Ripley Land Company, were credited on the accounts of the depositors as of that date. When this item had been credited to the account of the Ripley Land Company, it showed a balance of $1,127.55. Later, upon satisfactory evidence that the Ripley Land Company had not made any deposit on January 13, 1939, the auditors charged back this $1,000, which reduced its credit balance to $127.55. The FDIC acknowledged liability for this amount and paid it, without prejudice to the right of the Land Company to prosecute its claim for the $1,000 wrongfully withdrawn by the check of January 13, 1939.

With respect to this item the chancellor found as a fact and we concur in his finding, that "on January 13, 1939, the Partee Insurance Agency, a customer of said bank which had a deposit account in said bank, said agency being composed of G. M. Partee, president of the bank, W. Dan Majors, cashier of said institution, and W. I. Stewart, assistant cashier, owed the bank $1000.00 or more. This was evidenced by overdraft. At that time Stewart drew a check for $1000.00 (on the account of the Ripley Land Company) which was signed by Partee

and which was used to offset that amount of said Insurance Agency's debt. . . . This transaction was known to and participated in by those officers of the Land Bank who were also owners of said Insurance Agency, and one of whom was the officer of petitioner authorized to draw its checks."

He was of opinion that the knowledge of the bank's officers of the fraud was not imputable to the bank, and he accordingly dismissed the petition as to this claim also.

The important fact about this transaction is that the Partee Insurance Agency's overdraft was diminished by $1,000, and the bank profited by the transaction to that extent. The statement is made in the brief of appellee that the Insurance Agency received the benefit of the transaction because it received credit for the $1,000 on its overdraft, but the sum total of its indebtedness was not reduced, for whereas it owed the bank $1,000 less, it owed the Land Company the $1,000 which it had fraudulently obtained.

We cannot concur in the holding of the chancellor that the knowledge of the chief executive officers of the bank should not be imputed to the bank in such a case. The overdraft of the Partee Insurance Agency constituted an indebtedness of these very officers of the bank. They knew of and participated in the theft of the money from the Land Company's account to pay on their indebtedness to the bank. They were representing the bank as well as themselves in the transaction, and the bank must be held chargeable with their knowledge that they were paying their debts with stolen money.

In a similar case the supreme court of West Virginia said in Knobley Mountain Orchard Co. v. People's Bank, 99 W. Va. 438, 129 S. E. 474, 476, 48 A. L. R. 459, 462:

"It was to the interest of the bank to have these overdrafts adjusted; but the bank may not close its eyes to the fact that these payments were made with money which the debtors had no right to use and its cashier no right to receive. In attempting to avail itself of the acts of its cashier to its advantage, the bank becomes subject to those to its disadvantage."

Numerous cases supporting this view are referred to in a note to this case as reported in 48 A. L. R. 464, and in the notes to Brookhouse v. Union Publishing Co., 73 N. H. 368, 62 A. 219, as reported in 2 L. R. A., N. S., 993, 6 Ann. Cas. 675, and 111 Am. St. Rep. 623. And see also Emerado Farmers' Elevator Co. v. Farmers' Bank, 20 N. Dak. 270, 127 N. W. 522, 29 L. R. A., N. S., 567.

The bank has received the benefit of the fraud of its three executive officers in this transaction; and by retaining the benefit of their fraud, it must be held to have ratified their acts, and to be chargeable with their knowledge of their fraudulent conduct.

We think the chancellor was in error in holding that their knowledge of the fraud in the issuance and cashing of this check would not be imputed to the bank.

It results that the decree of the chancellor in dismissing the Land Company's petition will be reversed and a decree entered here in favor of the Ripley Land Company and against the Receiver and the FDIC for the sum of $2,224.07. The costs are adjudged against the appellees.

BANK STATEMENT AS NOTICE TO DEPOSITOR

Keller v. President, Directors and Company of Farmers Bank of State of Delaware, 24 Atl. Rep. (2d) 539

Rendering a statement to a customer showing the balance claimed by the bank is equivalent to a notice that any claim in excess of that amount will not be paid, and as to such excess the statute of limitations begins to run at once, and the depositor may sue without any subsequent notice.

In this case the bank sent statements to a depositor plainly indicating bank's position as to state of balance due the depositor on the two accounts which depositor had with the bank. The depositor failed to bring any action for a greater balance within three years from receipt of the statements. It was held that the depositor's claim for a greater balance was barred by the statute of limitations.

Action of assumpsit by Conrad Keller against the President, Directors and Company of the Farmers Bank of the State of Delaware. On defendants' motion for a directed verdict.

Prayer for a directed verdict granted.

James R. Morford (of Marvel & Morford), of Wilmington, for plaintiff.

Aaron Finger (of Richards, Layton & Finger), of Wilmington, for defendant.

RODNEY, J.—This was an action of assumpsit and the plaintiff claimed damages in the sum of upwards of $29,000. The plaintiff, starting with about the year 1924, had two accounts with the defendant bank, a "general" account and a "special" account. He claimed that he was not given credit for large sums that he had deposited with the defendant and had been charged in the books of the bank with large sums which he

NOTE — For similar decisions see Banking Law Journal Digest (Fifth Edition) §572.

had not withdrawn. In addition, he claimed that he should have been credited with large sums arising from numerous foreclosures, loan transactions, and proceeds from the sale of real estate formerly owned by plaintiff and bought by the defendant at mortgage foreclosure proceedings and afterwards sold at a profit. The plaintiff also contended that during the years 1930 and 1931 the defendant received all of the proceeds from the plaintiff's large fruit farm, and that these proceeds had not, as agreed, been credited to the plaintiff's account.

The defendant contended that the plaintiff had been given credit for all funds which had come into his hands and for all profit arising from the real estate transactions, and for all proceeds arising from farm management, and that all amounts had been paid. The defendant relied upon the pleas of Payment and Statute of Limitations.

At the trial and during the presentation of the defendant's case there was present in Court a great mass of the records of the defendant bank, through which were interspersed numerous individual items entering into the account. A witness for the defendant presented a "summary" of the records, made by him, which was offered in evidence and objected to. It appeared that the summary, while including the items appearing in the books, also contained certain statements and items otherwise appearing in evidence, and allegedly inserted in the summary to make the matter more clear to the jury.

Rodney, J., held "that it is within the sound discretion of a trial court to allow testimony from a summary rather than to compel a party to offer in evidence voluminous records and to trace numerous individual items from many volumes. 2 Wigmore (Penn Edition), Sec. 1230; Curry v. Charles Warner Co., 2 Marv. 98, 42 A. 425; Aetna Casualty & Surety Co. v. Mayor and Council of Wilmington, 17 Del. Ch. 285, 157 A. 208. In some cases the witness has been allowed to refresh his recollection from the summary, and in others the summary has been admitted into evidence. For either course to be pursued it is required (1) that the volumes or records from which the summary is made are either in evidence or present in Court, or available, under order of the Court, for any examination that the opposing side might see fit to make, and (2) that the person or persons by whom the summary is made is available for cross examination by the adverse party. The paper, however, sought to be admitted as a summary of voluminous records, and admissible on that ground, must contain only the items or summary of items shown by the records themselves. A party cannot, under the guise of a summary of voluminous records offer in evidence a paper containing matter foreign to the records purported to be summarized, and which may, in written form, contain the contentions of the party, drawn not only from the particular records themselves, but as well from other records or evidence."

The summary was excluded but, being redrawn, was admitted without objection.

At the conclusion of the testimony the defendant prayed that the jury be directed to return a verdict for the defendant, on the ground that every item of the claim of the plaintiff was barred by the Statute of Limitations.

In granting this prayer, Rodney, J., charged the jury, in part, as follows:

This suit is brought by Conrad Keller against the Farmers Bank of the State of Delaware, and the amount claimed by the plaintiff is a large one. It involves not only items of the bank account but also credits of numerous loan transactions and applications from numerous foreclosures and sales of property and of farm management. In the view that I have taken of the matter it is not now necessary to review the various transactions. It is all important to have attention drawn to the undisputed fact that all of the transactions in controversy or as to which any claim is made arose and were completed during the years 1924 to 1931.

The form of action in this case is called assumpsit and the action was brought January 18, 1940. One of the defenses relied upon is the Statute of Limitations of this State, and this statute is found as Sec. 5129 of the Revised Code of 1935, and so far as here material reads: "no action . . . of assumpsit . . . shall be brought after the expiration of three years from the accruing of the cause of such action."

Before considering the effect of the Act some passing attention may be given to its origin and purpose. In Reybold v. Parker, 6 Houst. 544, the history of the Act is set forth, although the date of the first English Act is erroneously stated as 1683, instead of 1623. In the cited case it is shown that our own Delaware Acts may be easily traced to 1742, and the exact language of the present Act was adopted January 30, 1829 (Vol. 7, page 267).

In Boston v. Bradley's Ex'r, 4 Har. 524, it is said that: "statutes of limitation are founded in wisdom and sound policy. They have been termed statutes of repose, and are regarded as highly beneficial. They proceed on the principle, that it is to the interest of the public to discourage the litigation of old or stale demands; and are designed not merely to raise a presumption of payment, but to afford a security against the prosecution of claims where, from lapse of time, the circumstances showing the true nature or state of the transaction, may have been forgotten; or may be incapable of explanation by reason of the uncertainty of human testimony, the death or removal of witnesses, or the loss of receipts, vouchers, or other papers."

It is therefore certain that under our statute law the action was barred after three years from the accruing of the cause of action, and it becomes most material to see when this cause of action accrued.

Statutes of Limitation begin to run when proper parties are in existence capable of suing and being sued, and a cause of action exists capable of being sued on forthwith.

The ordinary relation of a bank and its depositor is that of debtor and creditor, but some distinction is to be drawn between this and other similar relations. In the absence of express understanding the money is deposited subject to being paid on demand. A deposit cannot be made on one day and then a suit immediately brought for its recovery, without a demand or something equivalent thereto, and a refusal of payment or its equivalent. Johnson v. Farmers' Bank, 1 Har. 117, 119.

Here is where the crucial questions of the present case arise. It is the right of a depositor to know periodically the state of his account, and to have returned to him the cancelled checks or other evidences of payment by the bank from his account, so that he may test the accuracy of the account and the correctness of the balance. When the bank has complied with this duty there is raised the correlative duty on the part of the depositor to examine the account and vouchers and to make any objection thereto within a reasonable time.

The number of settlements of the account and statements furnished to the depositor (Keller) is in dispute. The bank contends that between the years 1925 and 1932 the "general" account was balanced 42 times and statements furnished, and the "special" account some 21 times. The plaintiff disputes these figures and contends that not nearly this number of statements were furnished. There is, however, in evidence and produced by the plaintiff himself, two statements which have controlling bearing in this case.

A statement of the "general" account concededly was sent the depositor and received by him, showing a balance due the depositor on Sept. 19, 1931, of $4.80. He subsequently drew a check for $4.85, which being refused payment he, on September 9, 1932, drew a check for $4.80, and the statement sent to Keller showed no subsequent balance whatever.

A statement of the "special" account also concededly was sent the depositor on December 18, 1928, showing a balance of 29 cents, and no further deposits or checks in any account bearing this name appear until November, 1937.

Of course when Keller received these statements he did not have to agree with their accuracy. He could entirely disagree and press any claim he might have for a greater balance. Bearing in mind that all of his claim is for items originating from 1924 to 1931, the question is presented as to whether or not the statements of the bank plainly indicated the position of the bank as to the state of the balance due the depositor so as to start the operation of the Statute of Limitations.

I am clearly of the opinion that Keller did not have to accept as accurate the balance as stated by the bank and that he had three years

from such time (as provided by the Statute of Limitations) to show the inaccuracy of the statement or any mistake by the bank.

I am equally of the opinion that any action to be taken by Keller was required by the express provisions of the statute to be taken within three years from the receipt of the statement furnished by the bank and setting forth its contention as to the balance due.

This view is greatly strengthened by the fact that from 1933 Keller was represented by two prominent members of the Bar. On July 3, 1935, they wrote to the bank explicitly making practically every demand made in this present suit, which demands were refused.

A summary of the pertinent legal principle is found in 5 Zollman on Banks and Banking, Perm. Ed., § 3388, where it is said:

"Rendering a statement to a customer showing the balance claimed by the bank is equivalent to a notice that any claim in excess of that amount will not be paid, and as to such excess the statute of limitations begins to run at once, and the depositor may sue without any subsequent notice."

To the same effect are Masonic Benefit Ass'n v. First State Bank, 99 Miss. 610, 55 So. 408; Detroit Piston Ring Co. v. Wayne County, etc., Bank, 252 Mich.163, 233 N. W. 185, 189, 75 A. L. R. 1273; Kansas City Title & Trust Co. v. Fourth National Bank, 135 Kan. 414, 10 P. 2d 896, 902, 87 A. L. R. 334; Union Tool Co. v. Farmers' & Merchants' National Bank, 192 Cal. 40, 218 P. 424, 28 A. L. R. 1417; Glassell Development Co. v. Citizens' National Bank, 191 Cal. 375, 216 P. 1012, 28 A. L. R. 1427; Penn Bank's Estate, 152 Pa. 65, 25 A. 310; and Lumpkins v. First National Bank of Mt. Hope, 153 Kan. 163, 109 P. 2d 66. See, also, note in 87 A. L. R. 344.

The foregoing has considered the claims of the plaintiff as connected with his "general" account. The plaintiff had also a "special" account which he testified was for his deposits of special funds to be used by him to decrease his indebtedness. The last settlement sheet of this account shows a balance of 29 cents, as of December 18, 1928, but some of the items of claim did not originate until 1931. There is, however, in evidence a duplicate pass book for this "special" account, furnished by the defendant to the plaintiff, and produced by him. This shows a balance in said account of 29 cents as of May 4, 1932, and this pass book makes applicable to the "special" account the same reasoning applied to the General account.

Owing to the fact that every item of the claim of the plaintiff originated and was complete during or before the year 1931 and, according to the plaintiff's contention should then have appeared in the bank balances as of that time, and owing to the further fact that the bank statements and pass book at least as of 1932 showed the bank's contention as

to these balances, it is clear that each item is barred by the Statute of Limitations.

A Court never desires to take from a jury any question of fact that has been submitted, and to order a verdict for the defendant, but a clear duty rests upon the Court when it is convinced that, under the law, no verdict for the plaintiff could be justified. It becomes the duty then to order a directed verdict.

The prayer for a directed verdict must be granted.

GIFT OF SAVINGS BANK ACCOUNT

Bynum v. Fidelity Bank of Durham, N. C., Supreme Court of North Carolina, 19 S. E. Rep. (2d) 121

The delivery of a lock box used primarily for the purpose of holding valuable papers and the keys thereto by a donor to a donee together with a recital of the contents of the box and a statement that everything in the box was donee's was delivery of the contents of the box as required to constitute an element of a "gift causa mortis."

In this case evidence showed delivery of keys, lock box, and its contents including savings bank book to donee. In donee's action to recover from the administrator money in the savings bank alleged to be a "gift causa mortis," it was held that whether savings bank deposit was delivery was a question for the jury.

Action by Mattie Bynum against the Fidelity Bank of Durham, N. C., and Leon W. Powell, administrator of the estate of Joanna Leathers, deceased, to recover upon a gift causa mortis wherein administrator cross-complained to recover from plaintiff certain personal property owned by decedent at time of her death. From an adverse decision, defendant appeals.

Affirmed.

This case was before this Court on the question of proper pleadings, at the Fall Term, 1940. Bynum v. Fidelity Bank, reported in 219 N. C. 109, 12 S. E. 2d 898.

Joanna Leathers, a widow, 70-odd years of age, died intestate in Durham County on September 15, 1939. She had no lineal descendants. She left surviving her certain collateral kin. Mattie Bynum, the plaintiff, wife of Will Bynum, is 43 years of age and was born to Zilphia Sears, a niece of Frank Leathers, in the home of Frank and Joanna

NOTE — For similar decisions see Banking Law Journal Digest (Fifth Edition) §§600, 606, 608.

Leathers. Two weeks after plaintiff's birth Zilphia Sears left her child with Frank and Joanna Leathers, who reared her. Plaintiff's name was changed to Mattie Leathers and she was grown before she knew that she was not the child of Frank and Joanna Leathers. She was supported and educated by them and treated by them as their child until her marriage in 1916. After plaintiff's marriage she and her husband went North to live. At the request of Frank Leathers she and her husband returned to Durham in 1931 and lived in the home of Frank and Joanna Leathers until the death of both of them. Frank Leathers died in February, 1932, and in his will he made certain provisions for the plaintiff and referred to her as his adopted daughter. The plaintiff, however, was never legally adopted by Frank and Joanna Leathers.

Prior to the death of Joanna Leathers, she had a savings account in the Fidelity Bank of Durham, N. C., in the amount of approximately $10,000. This savings account was represented by Savings Bank Book No. 3375. The plaintiff claims these funds by reason of an alleged gift causa mortis. The defendant, Fidelity Bank of Durham, is merely a stakeholder and has no interest in this controversy.

Plaintiff introduced evidence tending to prove her allegations of a gift causa mortis of the funds held by the defendant, Fidelity Bank of Durham, represented by the Savings Bank Book No. 3375, issued by the Bank to Joanna Leathers.

Defendant, Leon W. Powell, administrator of the estate of Joanna Leathers, filed an answer and denied the material allegations of the complaint, and by way of further answer and defense, cross-complaint and cross-action, alleged the plaintiff was not entitled to any of the property belonging to the estate of Joanna Leathers; further alleging that the plaintiff wrongfully and unlawfully took possession of an automobile, household goods and kitchen furniture, jewelry, personal effects and other personal property of an alleged value of $2,000, owned by Joanna Leathers at the time of her death; and that if plaintiff obtained possession of any property of Joanna Leathers, deceased, it was by wrongful, coercive, improper and unlawful means, and as a direct result of undue influence exerted by the said Mattie Bynum upon her.

The Court submitted the following issues:

"1. Did the deceased, Joanna Leathers, during her lifetime, give the savings bank deposit in controversy to the plaintiff, Mattie Bynum, as a gift causa mortis, as alleged in the complaint? Answer: Yes.

"2. If so, was the alleged gift of such savings bank deposit procured by undue influence exercised upon the decedent, Joanna Leathers, by the plaintiff, Mattie Bynum, as alleged in the answer? Answer: No.

"3. Did the plaintiff, Mattie Bynum, convert to her own use household goods and wares belonging to the decedent, Joanna Leathers, as alleged in the answer? Answer: Yes.

"4. If so, what was the market value of such household goods and wares at the time of such conversion? Answer: $350.00."

From the judgment on verdict defendant, Leon W. Powell, administrator of the estate of Joanna Leathers, deceased, appealed to the Supreme Court and assigns error.

Fred C. Owen, John D. McConnell, and Victor S. Bryant, all of Durham, for plaintiff.

Hedrick & Hall, C. V. Jones, and R. M. Gantt, all of Durham, for defendant, Leon W. Powell, adm'r.

DENNY, J.—We have examined the exceptions to the admission of evidence. In some instances evidence of like import was admitted without objection. In other instances the evidence was not such as would likely affect materially the results of the trial. On the record as a whole these exceptions fail to point to prejudicial or harmful error. Neither can the exceptions to His Honor's charge be sustained.

The only serious question for our consideration is as to the sufficiency of the evidence on the question of delivery.

The essentials of a gift causa mortis are set forth in Mordecai's Law Lectures, Vol. 2, at p. 1285, as follows: "There are three essentials to such a gift: (1) The gift must be with the view to the donor's death; (2) it must be conditioned to take effect only upon the death of the donor by his existing disorder; (3) there must be a delivery of the subject of the donation."

The appellant concedes that the plaintiff offered sufficient evidence to meet the first and second essential requirements to establish a gift causa mortis. Therefore we must consider the evidence offered to prove the third essential requirement of a gift causa mortis, namely, the delivery of the alleged gift.

Mary Johnson testified that she was in the home of Joanna Leathers late in the afternoon the day before Joanna went to the hospital, where she died seven or eight days later. That Joanna told her she was going to the hospital. That while she was there Joanna called Mattie Bynum into the room and told her to sit down. That Joanna Leathers was propped up in bed. That Joanna Leathers, said: "Mattie, I have something to tell you." Mattie said: "Yes, Ma'am," and Joanna said: "I have made up my mind to go to the hospital," and Mattie said: "You have, Mamma?" and Joanna said: "Yes, I am going, but I am not coming back the way I am going."

This witness further testified that Joanna Leathers then directed Mattie to get her pocketbook, which contained certain keys. That upon delivery of the pocketbook Joanna took out a bunch of keys and said,

"Mattie, these are your keys, don't you give these keys to nobody, don't you let nobody have them." Mattie Bynum was instructed in the presence of the witness to get a tin lock box out of the closet in the room which Joanna Leathers then occupied. The box was placed on Joanna's lap and while the box was resting on her lap, Joanna said: "Mattie, everything in this box is yours and this key unlocks this box and in this box it is that little box you sent to Pa, in that box is a little wooden box, the deed is in that, and in the box you sent to Pa, the big bank book and the little bank book is in there." The keys were placed in Mattie Bynum's hand by Joanna Leathers. Joanna still held the box on her lap when another neighbor, Estelle Cameron, came into the bedroom. Joanna told her of her plans to go to the hospital and stated that she had given Mattie her keys and that "Everything in that box is Mattie's." She then again described what was in the box. About that time Dr. Bowles rang the doorbell. According to this witness, Joanna said in a low tone, "Mattie, take the box and wrap it up and put it back in the closet."

Estelle Cameron testified that Joanna said: "Take the box and put it up."

Dr. F. N. Bowles testified that Joanna said on this particular occasion that she had decided she would go to the hospital and that "She wanted me to look after her and not to worry about my money, that she had given all of her things to Mattie and that Mattie would see that I got paid." That Mattie had some keys but that he did not see the box.

One of the leading cases in this state on the subject of gifts causa mortis is Newman v. Bost, 122 N. C. 524, 29 S. E. 848, 849. In that case the donor gave the donee certain keys and said: "What is in this house is yours"; and at another time "What property is in this house is yours." A bureau in which was found a life insurance policy after the death of the donor was present in the room when the keys were handed to the donee. The Court said in that opinion: "It being claimed and admitted that the life insurance policy was present in the bureau drawer in the room where it is claimed the gift was made, and being capable of actual manual delivery, we are of the opinion that the title to the insurance policy did not pass to the plaintiff, but remained the property of the intestate of the defendant. But we are of the opinion that the bureau and any other article of furniture, locked and unlocked by any of the keys given to the plaintiff, did pass, and she became the owner thereof. This is upon the ground that while these articles were present, from their size and weight, they were incapable of actual manual delivery; and that the delivery of the keys was a constructive delivery of these articles, equivalent to an actual delivery if the articles had been capable of manual delivery." Also: "The safe and box, in Thomas' [Adm'r] v. Lewis [supra, 89 Va. 1, 15 S. E. 389, 18 L. R. A.

170, 37 Am. St. Rep. 848, 878], were not present, so that the contents could not have been taken out and delivered to the donee by the donor. The ordinary use of a stand of bureaus is not for the purpose of holding and securing such things as a life insurance policy, though they may often be used for that purpose, while a safe and a box deposited in the vault of a bank are. A bureau is an article of household furniture, used for domestic purposes, and generally belongs to the ladies' department of the household government, while the safe and box, in Thomas' [Adm'r] v. Lewis, are not. The bureau itself, mentioned in this case, was such property as would be valuable to the plaintiff."

As stated in the above case, a bureau drawer is not ordinarily used for the purpose of holding valuable papers, but small tin lock boxes are, in fact they are used primarily for that purpose. The delivery of a lock box and the keys thereto by a donor to a donee, together with a recital of the contents of the box and the statement that "Everyhing in this box is yours," would constitute delivery of the contents of the box, as required by the decisions of this Court. A discussion of the many cases cited in the very thorough and able briefs filed by the attorneys for the respective parties in this action, we deem unnecessary. Whether or not there was a delivery by Joanna Leathers to Mattie Bynum of the Savings Bank Book No. 3375, issued by the Fidelity Bank of Durham to Joanna Leathers, which book was contained in the tin lock box, was a proper question to be submitted to the jury.

Again, in Newman v. Bost, supra, the Court in discussing a gift of certain furniture to the plaintiff, as a gift inter vivos, said: "The intention to give this property is shown by a number of witnesses, and contradicted by none. The only debatable ground is as to the sufficiency of the delivery. But, when we recall the express terms in which he repeatedly declared that it was hers; that he had bought it for her, and had given it to her; that it was placed in her private chamber, her bedroom, where we must suppose that she had the entire use and control of the same—it would seem that this was sufficient to constitute a delivery. There was no evidence that we remember disputing these facts, but, if there was, the jury have found for the plaintiff, upon sufficient evidence at least to go to the jury, as to this gift and its delivery." And "It is held that the law of delivery in this state is the same in gifts inter vivos and donatio causa mortis."

We think the plaintiff offered sufficient evidence on the question of the delivery of the keys to the lock box, the lock box and its contents to the plaintiff, to go to the jury on the question of the delivery of the savings bank deposit in controversy, represented by a savings account book in the lock box. The jury found for the plaintiff as to the gift and its delivery. The other exceptions are not of sufficient merit to disturb the verdict of the lower Court.

STIPULATIONS DESTROYING NEGOTIABILITY OF NOTE

American Finance Corporation v. Bourne, Supreme Court of Oklahoma, 123 Pac. Rep. (2d) 671

A promissory note contained certain provisions authorizing the payee to declare all indebtedness owed to the payee by the maker immediately due and payable if the maker failed to furnish additional security upon payee's demand. Other provisions in the note authorized the payee or the holder of the note to use the collateral hypothecated in its own business, and to part with the possession or control thereof, being only obliged at the taking up of the note to replace the collateral with "a like amount of similar security." It was held that the note was non-negotiable and the maker could present any defense against a holder that could have been presented against the payee.

Action by American Finance Corporation against R. F. Bourne to recover a balance allegedly due on a note. From a judgment for defendant, plaintiff appeals.

Affirmed.

Philip Sureck, of Oklahoma City, for plaintiff in error.

John Barry, of Oklahoma City, for defendant in error.

BAYLESS, J.—American Finance Corporation, a corporation, instituted suit in the District of Woodward County, against R. F. Bourne, and appeals from the judgment rendered in favor of Bourne.

Plaintiff's petition alleges that Bourne executed and delivered his promissory note, for a good and valuable consideration, to The Flag Company, and before maturity, for a good and valuable consideration, the payee negotiated the note to plaintiff, who was an innocent purchaser, and is now the owner and holder thereof. It is alleged that certain stocks were pledged, that default in payment at maturity was made, that the collateral was sold and the proceeds applied. Judgment was sought for the balance due.

Defendant's amended answer concedes the execution and delivery of the note and the pledging of the collateral, but denies the plaintiff is a bona fide holder, and sets up certain defenses. Plaintiff's reply controverts the defenses set out in the answer.

The sole issue presented to us relates to the negotiability of the note. The parties have so stipulated.

Defendant contends the note is made non-negotiable by the inclusion therein of certain provisions relating to the collateral and accel-

NOTE—For similar decisions see Banking Law Journal Digest (Fifth Edition) §935.

eration of the due date. We quote the provisions: "If the maker or any one of the makers hereof shall fail to furnish additional security upon the demand of said Company, said Company is authorized to declare all indebtedness owed to it by the maker or makers hereof immediately due and payable without giving notice of said declaration."

The brief of plaintiff is useful as a disclosure of the history of the case, but the argument therein directed to the effect of a quoted portion of the note on its negotiability is beside the point, for defendant disclaims in his brief any reliance on that particular language and insists that other language destroys its negotiability. We direct our attention to the issues set out in defendant's brief, the answer thereto in plaintiff's reply brief, and the supplemental briefs of the parties.

Defendant calls attention to sec. 11300, O. S. 1931, 48 Okl. St. Ann. § 21, setting out the requirements of a negotiable instrument, and directs attention particularly to provision three thereof reading: (an instrument to be negotiable) "3. Must be payable on demand, or at a fixed or determinable future time," and argues three propositions that properly touch that point.

Defendant also calls attention to certain language relative to the use and replacement of the collateral by the holder of the note, and insists this language affects the negotiability of the note under sec. 11304, O. S. 1931, 48 Okl. St. Ann. § 25, as being "an order or promise to do any act in addition to the payment of money."

Defendant contends that the language of this note is equivalent to the language of the note declared non-negotiable in Harrison v. Fugatt, 179 Okl. 367, 65 P. 2d 1200, because it authorizes holder to accelerate the due date simply by declaring he "deemed himself insecure"; and to the language condemned in Sommers v. Goulden, 147 Okl. 51, 294 P. 175, 72 A. L. R. 265, as authorizing the holder to demand additional collateral without any condition or limitation as to amount other than the caprice of the holder; and to the language in the note declared non-negotiable in Jennings v. Securities Inv. Co., 151 Okl. 32, 1 P. 2d 687, because it authorized the holder to declare all indebtedness due, and to sell the collateral, without notice or making demand for performance.

Plaintiff takes issue with defendant as to the analogy between this case and those, and argues further that the language of the note before us carefully avoids placing in the holder the power to capriciously accelerate the due date of the note, thereby rendering its time of payment uncertain by dependency upon nothing more certain than the holder's whim.

The parties seem in accord in recognizing that a note containing language providing for the power of acceleration of the due date upon the caprice or whim of the holder is thereby rendered non-negotiable.

7 Am. Jur. 878, Ch. II, sub-division E (4), and annotation at 72 A. L. R. 268.

The case containing language raising an issue nearest applicable to this language of this note is Sommers v. Goulden, supra [147 Okl. 51, 294 P. 176, 72 A. L. R. 265]. There the note provided: "In case of depreciation in the market value of any security pledged for this obligation, the maker agrees to deposit on demand additional collateral so that the market value shall always be at least twenty per cent more than the amount of this note, . . .", the due date might be accelerated for the failure of the maker to comply. In the note before us acceleration is permitted if the makers "shall fail to furnish additional security upon demand."

In the Sommers case we held the note was not rendered non-negotiable by the language quoted, because there was thereby set up a test by which the holder's right to demand could be judged, the depreciation in market value, and a standard by which the amount of additional security demandable could be judged, a market value of 20 per cent more than the amount of the note. No caprice or whim could prevail when thus judged. We said: "this does not leave the payee or holder of the note an option to declare the note due at any time as in his judgment might seem best," thereby inferring that the unrestrained power to declare maturity had the opposite effect. See West Point Co. v. Gaunt, 150 Tenn. 74, 262 S. W. 38, 34 A. L. R. 862.

In the case of Harrison v. Fugatt, supra, the language of the note authorized acceleration merely on or feeling of insecurity. That is almost the test here included, except that in this note the holder was not even required to declare the nebulous state of deeming himself insecure. We cited Oklahoma State Bank v. First Natl. Bank of Grandfield, 108 Okl. 272, 236 P. 581, 582, wherein we said concerning a similar note: "For reversal, it is first contended that the trial court erred in instructing the jury that said note was non-negotiable. The first part of the instrument sued on contains all the elements of a negotiable note. . . . certain recitals are contained in the face of the note whereby it was to become due upon the performance or nonperformance of certain acts by the maker thereof. . . . The trial court took the view, and it is the contention of the defendants in error that this clause in the note is contrary to the third provision of section 7671, Comp. Okl. Stat. 1921 [11300, O. S. 1931, 48 Okl. St. Ann. § 21], which is a part of the Uniform Negotiable Instruments Act, and that therefore said note was nonnegotiable. . . . The question therefore for our determination is: What is the effect on negotiability where the payee is given an option to declare a note, due before maturity, independent of any default on the part of the maker? . . . The . . . rule is announced in the following cases: . . . Nickell v. Bradshaw, 94 Or. 580, 183 P. 12, 11 A. L. R. 623.

. . . Paragraph 6 of the syllabus provides: 'A note payable on a definite day is not rendered nonnegotiable by a conditional promise to pay on an earlier day, unless the earlier day is completely dependent on the caprice of the holder.' No cases are cited and we have been unable to find any that hold to the contrary, and for that reason we conclude that the trial court properly held the note under consideration to be nonnegotiable. Therefore, although the plaintiff bank was a bona fide purchaser before maturity, the note was subject to every legal defense which could have been interposed against it in the hands of the original payee."

We think the note in the record before us containing the language it does is governed by these holdings.

The argument made in support of the other issue serves to illustrate the characteristics of the note before us that serve to transform it from a negotiable promissory note into another type of written contract. The language of the note authorizes the payee or the holder of the note to use the collateral hypothecated in its own business, and to part with the possession or control thereof, being only obliged at the taking up of this note to replace the collateral with "a like amount of similar security." Of course, the power of the payee or other holder to hypothecate in connection with their business, the collateral hypothecated by defendant offers the occasion for the separation of possession and control of the note and the collateral and, of course, must comprehend the possibility of the entire loss of this collateral in the subsequent hypothecation. It must be noticed too that after the payee or a holder has rehypothecated the collateral the note could be endorsed to some other holder and according to the terms of the note it would be permissible for the subsequent holder to demand the hypothecation of additional collateral with him for the security of the note held by him, which had theretofore been stripped of the security of the previous collateral, and to accelerate the maturity under such a demand. The complications thus permissible under this instrument and the concomitant rights and liabilities which could arise under this note, which is sought to be called a negotiable promissory note, may exceed anything contemplated by the Uniform Negotiable Instruments Act. As said in the Grandfield case, supra, the first portion of the note before us contains all of the essential elements of a negotiable promissory note under the terms of our act, but the succeeding language and the rights and liabilities provided for thereunder convert the note into something far different from an ordinary negotiable promissory note.

For the reasons stated, we think the note before us is nonnegotiable and by reason thereof the maker may present any defense against the present holder that could have been presented against the note in the hands of the original payee.

RIGHT OF SURVIVORSHIP IN JOINT BANK ACCOUNTS SUBJECT TO SUCCESSION TAX

McLaughlin v. Cooper's Estate, Supreme Court of Errors of Connecticut, 24 Atl. Rep. (2d) 502

In the case of a bank account in the name of two persons with a right of survivorship, either may draw out the entire sum and so destroy not only his own interest in it but that of the other tenant. The right which a survivor has, on the death of one of those in whose names the bank account stands, to succeed to the account, is such an interest passing by death as to be properly subject to succession tax.

In this case deceased during his lifetime created with his own money certain bank accounts in the name of himself and survivor with right of survivorship. Before deceased's death, survivor created bank accounts in name of herself and deceased with right of survivorship. Under Connecticut law, it was held that on deceased's death the succession tax should have been computed by first deducting statutory exemption of $5,000 from aggregate amounts of accounts in names of deceased and survivor, whether the funds for those accounts were contributed by one or the other, and by applying the proper tax rate to one-half of the remainder.

Action by Charles J. McLaughlin, Tax Commissioner, against the estate of George W. Cooper, to determine the taxability of certain joint bank accounts under the succession tax law. From a decree of the Probate Court for the district of Newtown, the plaintiff appealed to the Superior Court in Fairfield County. The appeal was reserved by the Superior Court for the advice of the Supreme Court of Errors.

Judgment in accordance with opinion.

Louis Weinstein, Inheritance Tax Attorney, of New Haven (Francis A. Pallotti, Atty Gen., and Frederic W. Dauch, Deputy Tax Com'r, of Waterbury, on the brief), for plaintiff.

Samuel A. Davis, of Danbury, for defendant.

MALTBIE, C. J.—George W. Cooper died on January 20, 1940, and his estate is in settlement in the Probate Court for the district of Newtown. In 1935 and 1937 Cooper created certain bank accounts in the name of himself and Julia M. Hawley, with right of survivorship, contributing all the money himself, and at his death the aggregate amount on deposit in them was $14,713.83. Prior to his death, Julia M. Hawley created two bank accounts in the names of herself and Cooper, with right of survivorship, contributing all the money for them, and

NOTE—For similar decisions see Banking Law Journal Digest (Fifth Edition) §1520.

at Cooper's death they amounted to an aggregate of $6,240.45. The tax commissioner, acting under the provisions of § 495c of the 1935 Cumulative Supplement of the General Statutes, filed a petition in the Probate Court for the determination of the question of the taxability of these accounts, claiming that they were taxable under the provisions of § 395e of the Cumulative Supplement of 1939 as gifts intended to take effect in possession or enjoyment at the death of the transferor, or § 396e of the Cumulative Supplement of 1939 concerning taxes upon jointly owned property. The commissioner now claims that they are taxable only under the latter section, a copy of which is printed as a footnote.[1] The Probate Court entered a decree that the accounts created by Julia M. Hawley were not to be considered in computing the amount of tax due, that only one-half of the amount of the accounts contributed by Cooper was to be considered, and that from this half was to be deducted the exemption of $5,000 provided in the statute and also an exemption of $500 upon the basis that Julia M. Hawley was a Class C legatee under the provisions of General Statutes, Cumulative Supplement, 1939, § 397e. The tax commissioner appealed from that decree to the Superior Court and the case has been reserved for our advice.

At the hearing before us, counsel were in agreement that the $500 deduction should not have been made by the Probate Court, for the reason that any such deduction would not properly come before the court upon this petition but only when the tax commissioner filed with the court his computation of the tax due, as he is required to do by § 498c of the 1935 Cumulative Supplement of the General Statutes. It was also agreed before us, and we concur, that the $5,000 exemption provided in the statute should be deducted from the total amount of the deposits upon the basis of which the tax is to be computed, before the division by which, under the statute, only one-half of the deposits is to be considered. Section 396e, enacted in 1937, was a substitute for

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[1] "Sec. 396e. Jointly owned property. Whenever property shall be held in the joint names of two or more persons and the survivor or survivors of them, the right of the survivor or survivors to the immediate ownership or possession and enjoyment of such property shall be a taxable transfer and the tax shall be computed as though a fractional part of the property, determined by dividing the fair market value of the entire property by the number of persons in whose joint names it was held, belonged absolutely to the deceased person and had been bequeathed or devised by him to the survivor or survivors by will; provided, in addition to any exemption granted under the provisions of this chapter, the provisions of this section shall not render subject to a succession tax joint checking or savings accounts in banks or savings banks payable to either or to the survivor if the aggregate thereof shall be less than five thousand dollars, but a fractional share of any excess over five thousand dollars shall be taxable. The provisions of this section shall not be construed to prevent the taxability, in whole or in part, under the provisions of subsection (c) or (d) of section 395e of any property held in the joint names of two or more persons and the survivor of them, including any joint checking or savings account in any bank or savings bank. The limitations imposed by section 1360 shall apply to any tax imposed under the provisions of this section."

§ 1362 of the General Statutes. The predecessor of the latter section, chapter 81 of the Public Acts of 1927, came before us in Blodgett v. Union & New Haven Trust Co., 111 Conn. 165, 149 A. 790. In that case a wife wrote a banking firm which was holding certain bonds owned by her that she wished them thereafter to stand in her husband's name as well as her own, so that if she died suddenly the property would pass to him without any legal formalities, and thereafter the bonds were so held by the firm. We held that the effect of the transaction was to make the husband and wife tenants in common of the bonds, with a right in the survivor to take the whole as a remainder interest; that the statute applied only to joint estates where the right of survivorship was attached by operation of law, and did not apply to such a situation as the one before us; that at the death of the wife the husband became entitled to the full possession of the bonds, including the half interest she had owned in them, and to the enjoyment of the right to the income from that half which before had been hers; that the right so coming to him constituted property passing by gift intended to take effect in possession or enjoyment at the death of the donor and as such was taxable; and that the legislature had the power to impose a tax upon such interest as the husband acquired in the bonds at the death of his wife.

The present statute differs in important respects from the 1927 act. It is now so drawn as to do away with the distinction which was made in our opinion in the Union & New Haven Trust Co. case, and to apply generally to property held in the joint names of two or more persons and the survivor or survivors of them; also the earlier act expressly excepted from its operation joint checking or savings accounts in any bank, whereas the present statute expressly includes such accounts, subject to the exemption provided in it. So much, however, of our decision in the Union & New Haven Trust Co. case as held that the legislature had the power to impose a tax upon the succession of the survivor to the right to the bonds there involved establishes its power to impose the tax provided in § 396e. There is even more reason to hold that a bank account in the names of two or more persons with right of survivorship does not create a joint estate in the technical sense of the term than there was in the case of the bonds then considered. It is an incident of a true joint estate that each party has, as his own, an interest in the property, and while one joint tenant can convey away his interest, he cannot adversely affect the interest of the other joint tenant or tenants; Mitchell v. Hazen, 4 Conn. 495, 509, 10 Am. Dec. 169; but in the case of a bank account in the name of two persons with a right of survivorship, either may draw out the entire sum and so destroy not only his own interest in it but that of the other tenant. The right which a survivor has, on the death of one of those in whose names the account stands, to succeed to the property is such an interest

passing by death as to be properly subject to the succession tax. See Matter of Kane's Estate, 247 N. Y. 219, 160 N. E. 17, modifying upon reargument Matter of Kane's Estate, 246 N. Y., 498, 159 N. E. 410, cited in the Union & New Haven Trust Co. case.

It is not contended on behalf of the estate that the computation of the tax upon the basis provided in the statute violates any constitutional limitation. It is noly claimed that the result produced is "unfair." Considerations involved in that contention are to be addressed not to the courts but to the legislature, which may determine "the choice of subject-matter of taxation and the extent and manner of the tax, save as constitutional limitations may intervene." State ex rel. Brush v. Sixth Taxing District, 104 Conn. 192, 198, 132 A. 561, 563. Counsel for the estate cite to us certain decisions in New York and New Jersey, but while § 1362 of the General Statutes was virtually copied from the New York statute, § 396e so varies from the statutes of either New York or New Jersey as to make their decisions largely inapplicable to it. Pennsylvania has, however, a statute very similar to ours, and In re Cochrane's Estate, 342 Pa. 108, 20 A. 2d 305, 135 A. L. R. 1058, it was upheld and its application to bank accounts deposited in the joint names of the deceased and another was sustained.

It is sufficient answer to the questions propounded to say that a tax should be computed by deducting the statutory exemption of $5,000 from the aggregate amounts of the accounts in the names of Cooper and Julia M. Hawley, whether the funds for those accounts were contributed by one or the other, and applying the proper tax rate to one-half of the remainder.

INDORSEMENT WHERE MORE THAN ONE PAYEE

Wormhoudt Lumber Co. v. Union Bank & Trust Co. of Ottumwa, Supreme Court of Iowa, 2 N. W. Rep. (2d) 267

Where a check is payable to two payees who are not partners, both must indorse unless the one indorsing has authority to indorse for the other.

In this case a depositor made a written contract with a contractor and a lumber company for the erection of a dwelling house. The contractor and the lumber company were termed the "contractor," although the lumber company signed primarily to guarantee performance of the contract in return for the contractor's purchase of the materials from the lumber company. Several

NOTE — For similar decisions see Banking Law Journal Digest (Fifth Edition) §§57, 686.

checks executed for application on the building contract were made payable to both the contractor and the lumber company. After cashing the checks the contractor absconded, leaving unpaid labor and material claims. The depositor then assigned her claim against the bank to the lumber company. It was held that the evidence sustained judgment for the company on the ground that the contractor had neither implied nor ostensible authority to sign the company's name, and the company had no knowledge that the contractor was indorsing the checks.

Action at law, tried to the court without a jury, by the assignee of the drawer of checks to recover from the drawee bank amounts paid out on unauthorized indorsements. Judgment for plaintiff. The bank appeals.

Affirmed.

Gilmore, Moon & Bannister, of Ottumwa, for appellant.

Chester W. Whitmore, of Ottumwa, and Buell McCash, of Bloomfield, for appellee.

GARFIELD, J.—On October 3, 1938, Mrs. Caroline D. Christie made a written contract with L. W. Stearns, a contractor, and plaintiff-appellee, Wormhoudt Lumber Co., a dealer in building materials, for the erection of a dwelling house for her for $7,304. Stearns and appellee were termed the "contractor," although the lumber company signed primarily to guarantee performance of the contract, in return for Stearns purchasing the materials from appellee. Stearns constructed the house to near completion. Between November 16, 1938, and March 1, 1939, Mrs. Christie made and delivered to Stearns to apply upon the contract price eight checks drawn on her account in defendant-appellant bank, payable to "Wormhoudt Lumber Co. and L. W. Stearns." Stearns indorsed these checks totaling $5,100 not only in his own name but also in the name of the lumber company. Appellant bank cashed the checks and charged the deposit account of Mrs. Christie with the amounts thereof.

The court found that the indorsements by Stearns of the lumber company's name on the eight checks were without authority from appellee. Stearns absconded, leaving more than twenty unpaid claims for labor and material furnished for the Christie house. Some mechanics' liens were filed. Appellee, by reason of its contract liability to Mrs. Christie, paid the lienable claims against the property and canceled its own claim for materials furnished, in consideration of the payment to it by Mrs. Christie of the withheld balance of the contract price amounting to $806.69. On August 7, 1939, appellee took a written assignment from Mrs. Christie of all claims held by her against appellant bank arising out of its transactions with Stearns.

Thereupon appellee brought this action at law against the bank as

assignee of Mrs. Christie to recover the amounts wrongfully charged against the Christie account on the checks bearing the unauthorized indorsements. The petition conceded that $1,400 of the proceeds of the eight checks was paid to appellee by Stearns, thereby reducing its claim to $3,700. The case was tried to the court without a jury. In its judgment, the court credited the bank not only with the $1,400 which appellee received from Stearns, but also with approximately $2,150 which Stearns had paid, out of the proceeds of the checks, for labor and materials for the Christie job for which mechanics' liens might have been filed if the claims had not been paid. Judgment was entered against the bank for so much of the amounts paid out on the checks wrongfully indorsed as Stearns had not used to pay appellee or other lienable claims against the property. The amount was found to be $1,553.86. The bank has appealed.

I. At the outset we are met with appellee's motion to dismiss the appeal based in part upon appellant's failure to comply with Rule 30 of this court. It must be admitted that appellant's assignments of error fall considerably short of strict compliance with our rule. Nevertheless we have concluded to overrule the motion and consider the appeal on its merits.

II. It is too elementary to require the citation of authority that the findings of the court in this action at law have the effect of a jury verdict and this court will not interfere if such findings are supported by substantial evidence.

III. Before considering the matters complained of, we mention certain well-settled legal propositions applicable to the case. A bank is ordinarily under an absolute contractual duty to determine at its peril the genuineness of indorsements of its depositor's checks. It has no right to charge the depositor's account with amounts paid out on unauthorized indorsements and if it does so, regardless of its good faith or freedom from negligence, it will be held liable to the drawer, unless the latter's negligence or other fault has misled the bank. 9 C. J. S., Banks and Banking, § 356c, p. 734, et seq.; 7 Am. Jur., p. 427, et seq., § 590; McCornack v. Central State Bank, 203 Iowa 833, 836, 211 N. W. 542, 52 A. L. R. 1297; Erickson Co. v. Iowa Nat. Bank, 211 Iowa 495, 497, 230 N. W. 342; German Sav. Bank v. Citizens' Nat. Bank, 101 Iowa 530, 538, 70 N. W. 769, 63 Am. St. Rep. 399. See sections 9483, 9646, Code 1939 (§§ 23, 185, of Negotiable Inst. Law). The drawee bank will not be liable, however, for money paid out on an unauthorized indorsement which reaches the person whom the drawer intended should receive it. 9 C. J. S., Banks and Banking, § 356c, p. 737. Where a check is payable to two payees who are not partners, both must indorse unless the one indorsing has authority to indorse for the other. Code, section 9501 (§ 41 of N. I. L.).

IV. We consider now the matters urged by appellant. Mrs. Christie was entirely within her rights in making the checks payable to both appellee and Stearns. They were both named in the building contract as contractor. Appellee requested that the checks be so made. Stearns accepted them in that form. Appellee had not only, in effect, guaranteed performance of the contract but furnished the greater part of the materials and obviously was interested in the proper application of the funds.

V. Appellant argues that Mrs. Christie suffered no loss as a result of appellant's charging her account with money paid out on the unauthorized indorsements; that she agreed to pay $7,304 for her house; that is all she did pay, aside from certain extras, and she has her house free from liens. It must be conceded that appellee, as assignee of Mrs. Christie, has no greater rights than she would have had as plaintiff. The contention, however, is without merit. The reason Mrs. Christie ultimately suffered no loss is because appellee protected her, as it had contracted to do, and paid off the lienable claims against the property. Appellant is not entitled to credit for the money paid by appellee for Mrs. Christie's benefit to laborers and material men, nor for the amount of appellee's own claim for materials furnished, which appellee canceled. The money paid by appellee was not payment of any part of appellant's liability to its depositor. This contention is ruled by National Surety Co. v. Bankers' Tr. Co., 210 Iowa 323, 228 N. W. 635; New Amsterdam Casualty Co. v. Albia State Bank, 214 Iowa 541, 239 N. W. 4, 242 N. W. 538; Grubnau v. Centennial Nat. Bank, 279 Pa. 501, 124 A. 142. See, too, Shipman v. Bank of State of New York, 126 N. Y. 318, 27 N. E. 371, 374, 12 L. R. A. 791, 22 Am. St. Rep. 821.

VI. During the progress of the trial appellant's counsel offered to prove that appellee was indebted to Stearns on other jobs having no relation to the Christie contract. The court, upon appellee's objection that it was immaterial and outside the issues, ultimately refused to consider the offers of evidence, stating as his reason that appellant had not pleaded any indebtedness from appellee to Stearns as a defense or by way of setoff or counterclaim. Appellant's theory is that if it paid Stearns money which should have gone to appellee, this caused appellee no loss if it, in turn, were indebted to Stearns on other matters. Some of the offers were merely of claimed excessive charges on the part of appellee against Stearns for material furnished on other jobs which were not claimed to have been paid by Stearns.

Without passing upon the propriety of the above evidence if it had been within the issues pleaded by appellant nor deciding whether these matters could properly have been made the basis of setoff or counterclaim, we think it clear that appellant could not avail itself of these matters without having pleaded them. It is too elementary to require

the citation of authorities that a set-off not pleaded cannot be proven. What appellant was attempting, without any pleading to support it, was an accounting between appellee and Stearns who was not a party to the suit and would not be bound thereby. During the progress of the trial appellant moved that Stearns be made a party, under Code, section 10981. However, so far as the record shows, the motion was never submitted to the court nor ruled upon, and appellant cannot be heard to complain that Stearns was not made a party.

VII. Although not mentioned in any assignment of error, appellant argues that the court erred in not crediting it with $63.64 paid by Stearns, out of the proceeds of the checks, for workmen's compensation insurance and social security for his workmen. Appellant is scarcely in position to urge this matter, not only because not assigned as error, but also because of its concession that it does not complain of the amount of the judgment if appellant be held liable. Nevertheless, we think the ruling was proper. The money did not go to anyone whom Mrs. Christie intended should receive it, nor was she benefited by the payment of these two small items. Her property could not be subjected to a mechanic's lien for premium on workmen's compensation insurance nor for social security. Code, sections 10270 and 10271 do not include such items. Section 10299(5), applicable to liens on certain public improvements, includes claims for workmen's compensation insurance but has no application to this case.

VIII. Appellant urges that Mrs. Christie was negligent as a matter of law in failing to object to the indorsement of her checks by Stearns within a reasonable time after her monthly statements and canceled checks had been returned to her. Assuming that the evidence would justify a finding of negligence on the part of Mrs. Christie, we are clear that such a finding as a matter of law was not required. It must be remembered that the primary duty to determine the genuineness of indorsements rests upon the drawee bank which has obligated itself to pay out the money of its depositor only to those authorized to receive it. Ordinarily, when a depositor receives back his canceled checks, he has a right to assume that the bank has satisfied itself that the payees' indorsements are genuine, as it was in duty bound to do, and is under no affirmative duty to examine the returned vouchers for forged or unauthorized indorsements, unless he has reason to believe they are without authority. New Amsterdam Casualty Co. v. Albia State Bank, 214 Iowa 541, 551, 239 N. W. 4, 242 N. W. 538, and cases cited, 9 C. J. S., Banks and Banking, § 356d(4), p. 748. The lack of duty ordinarily resting on a depositor to look for forged indorsements on canceled checks should not be confused with his duty to exercise due care to detect forgeries of his own signature as maker, from the returned vouchers and bank statement. 9 C. J. S.,

Banks and Banking, § 356d(1), p. 743. This was an affirmative defense which appellant was required to prove by a preponderance of the evidence. Without discussing the testimony, we are satisfied it is ample to support the finding of the court that Mrs. Christie was not negligent as claimed by appellant.

IX. Appellant's remaining contention is that the court erred in not finding as a matter of law that Stearns had implied, apparent or ostensible authority from the lumber company to indorse the checks. Appellant makes no claim that Stearns had express authority to indorse these checks for appellee. It is doubtful if appellant is in position to make this contention in view of the following concession made by its counsel upon the trial: "I think you have proved that presentation to the bank was without authority from Wormhoudt. Stearns didn't have authority to make indorsement on any of these checks. Stearns had no business to sign these checks and get the money." Aside from the above, however, we are clear that appellant did not establish as a matter of law either implied or ostensible authority on the part of Stearns to sign appellee's name. Here, again, the burden to prove such authority rested upon appellant. On this issue, appellant relies upon Federal Land Bank v. Union Bank & Trust Co., 228 Iowa 205, 209, 290 N. W. 512. There, however, the evidence of ostensible authority was much stronger than here; there was a finding in favor of the bank; the payee of the checks appealed and we held there was sufficient evidence to support the finding. The opinion of the trial court here indicates that he gave careful consideration to the evidence bearing on the authority of Stearns. He found that appellee had no knowledge that Stearns was indorsing the checks. There is ample evidence to support the finding of lack of authority.

SUBSCRIPTION TO CERTIFICATE OF DEPOSIT BY MAKERS OF PROMISSORY NOTE

Atlanta Coledrinx Co., Inc., v. Morris Plan Bank, Court of Appeals of Georgia, 19 S. E. Rep. (2d) 205

The makers of a promissory note subscribed for an investment certificate of deposit of a Morris Plan bank in an amount equal to the face of the note, and agreed to pay for it fully on the terms set forth in a pass book issued to them at the time of the closing of the loan evidenced by the note, and transferred to the bank, as collateral security to secure the note, all of the makers' right, title and interest

NOTE — For similar decisions see Banking Law Journal Digest (Fifth Edition) §221.

in and to the subscription. It was held that the note, which contained nothing to show that completed sale or delivery of certificate was to be made until it was fully paid for, was not void on ground that it was violative of statute forbidding a bank to issue or sell its certificates of deposit except for actual cash or its equivalent.

Action by the Morris Plan Bank against the Atlanta Coledrinx Company, Inc., and others on a note. To review an adverse judgment, the defendants bring error.

Affirmed.

The Morris Plan Bank of Georgia sued the Atlanta Coledrinx Company, Inc., and others on a promissory note due eighteen months after date, to recover the sum of $5,400 principal with interest and attorney's fees. The signers therein subscribed for an investment certificate of deposit of the Morris Plan Bank in an amount equal to the face of the note, and agreed to pay for it fully on the terms and conditions set forth in a pass book issued to them at the time of the closing of the loan evidenced by the note, and transferred and assigned to the bank, as collateral security to secure the note, all their right, title and interest in and to the subscription No. 5M17300. The note further provided that upon default in the payment of any instalment due on the subscription for the investment certificate of deposit the note should become due and payable at the option of the bank. The petition alleged that the subscription instalment of $300 due May 5, 1941, was not paid when due, and that plaintiff "called" the note sued on due according to its terms. The defendants filed a motion to dismiss the action on the ground that the petition showed that the transaction is made a crime by the laws of the state, and that there could therefore be no recovery thereon. The court overruled the motion, after the petition was amended to show the above facts, and the defendants excepted.

Mozley & Combs, of Marietta, and Burress & Dillard, of Atlanta, for plaintiffs in error.

Houston White, of Atlanta, for defendant in error.

FELTON, J.—Plaintiffs in error contend that the transaction disclosed by the note sued on is violative of Code, § 13-2018, which forbids any bank to issue or sell its certificates of deposit except for actual cash or its equivalent. The petition and note do not show a sale of a certificate of deposit other than for cash or its equivalent. They do not show that a certificate of deposit has been issued, sold or delivered; they merely show a contract to sell. We see no prohibition against such a transaction in the Code section referred to. The purpose of the law is to "prevent a bank from pledging its credit and increasing its liability to depositors by trading its certificates of deposit for any instrument not the equivalent of cash." City of New York Ins. Co. v.

Mobley, 44 Ga. App. 474(1), 161 S. E. 791, 792. There is nothing in the note or petition to show that the completed sale or delivery of the certificate was to be made until it was fully paid for. This is the only question raised by the demurrers. The court did not err in overruling the motion to dismiss the action.

RIGHT TO SET OFF "OUTLAWED" DEBTS DUE TO ESTATE FROM BENEFICIARY

Fleming v. Yeazel, Supreme Court of Illinois, 40 N. E. Rep. (2d) 507

An executor holding notes in favor of estate from the legatees has the right to deduct such indebtedness from the legacies of the legatees even if the notes were barred by the statute of limitations. The right of an executor to deduct such an indebtedness is based upon the equitable principle that no one should be permitted to share in a fund until he has discharged his obligation to contribute to that fund. To allow the legatees to escape payment of their debt to the estate and at the same time receive a full distributive share of the estate, would serve to increase their share by the amount of their indebtedness.

Proceedings in the matter of the estate of Ellen Yeazel, deceased, wherein Charles W. Fleming, executor of the estate of Ellen Yeazel, deceased, filed a petition against Clark Yeazel and others, for directions as to manner of making distribution. From a judgment of the Appellate Court, 311 Ill. App. 641, 37 N. E. 2d 568, reversing a judgment of the circuit court and remanding it with directions, Clark Yeazel and other appeal.

Affirmed.

V. W. McIntire, of Danville, for appellants.

W. T. Henderson and Francis G. Rearick, both of Danville, guardian ad litem for appellees.

STONE, J.—This case arose on a petition of the executor of the estate of Ellen Yeazel, deceased, for directions as to manner of making distribution. By the will, the executor, after payment of debts, was directed to reduce all the estate to cash and divide it equally among nine legatees, naming them, two of whom are appellants Clark Yeazel and Jesse Hight. Each of the latter was indebted to the testatrix at the time of her death. The executor's petition sought authority to charge these debts against the legacies of appellants Yeazel and Hight. Objec-

NOTE — For similar decisions see Banking Law Journal Digest (Fifth Edition) §494.

tion was made on the ground that the notes given to represent the debts were "outlawed." The petition was allowed by the probate court and on appeal to the circuit court of Vermilion county it was denied. On further appeal to the Appellate Court for the Third District, the decree of the circuit court was reversed and the order and judgment of the probate court were upheld. The cause is here on certificate of importance.

There is no dispute as to the facts. Appellant Yeazel, on June 2, 1924, executed and delivered to the testatrix his note in the sum of $1,186, bearing interest at the rate of five per cent per annum, due three years after date. The only payment made on the note was $118, made on June 2, 1926, as interest. Hight was likewise indebted to the testratrix on a note for $200, dated July 23, 1926, bearing interest at the rate of five per cent per annum, due one year after date. No payments of any kind were ever made on that note. The petition of the executor sought authority to deduct from the share of the appellants the amount of their notes and interest.

The question whether "outlawed" debts due an estate from a beneficiary can be set off against the interest of that beneficiary has never been directly passed upon by this court. In Jeffers v. Jeffers, 139 Ill. 368, 28 N. E. 913, such a debt was sought to be set off against the interest of a party in a partition proceeding but it was held that while an executor might deduct a debt due against the estate from a legatee, even though outlawed, such could not be done in a partition proceeding. The question here was not before the court and therefore the case does not amount to a decision of that particular question.

Counsel on either side have cited numerous cases from other jurisdictions in support of their contentions. It is evident that those cases are in conflict on the question. In the early case of Newland v. Marsh, 19 Ill. 376, this court was considering the constitutionality of a limitation law. There the argument was made that a limitation law based on possession and seven years' payment of taxes was invalid because the General Assembly had no power to take property from a citizen. The question there concerned the validity of the statute to quiet possession and confirm titles to lands. The Limitations Act was sustained on the ground that the theory of limitation laws is that they affect the remedy limiting the period within which rights may be asserted or remedies resorted to may be enforced. In other words, they bar the right to sue to recover but do not extinguish the debt or the property right. It was there held that upon no other ground can statutes of limitation be sustained, and even though the second section of the Limitations Act there considered purported to confer title, only by treating it as a limitation of the remedy rather than as a positive right could it be sustained.

In the early case of Keener v. Crull, 19 Ill. 189, it was held that the statute of limitations controls the remedy for recovery of the debt, but the debt remains the same as before, excepting that the remedy for enforcement is gone. It was also held that the debt, constituting as it does an unquestioned moral obligation, is a good consideration to support a promise to perform the obligation, and a new promise based upon that moral obligation is binding on the debtor in avoidance of the bar of the statute. These cases have never been overruled, and we find no disagreement in the authorities in this state as to the nature of the effect of statutes of limitation. Statutes of limitation in this state are statutes of repose. Section 16 of the Limitations Act (Ill. Rev. Stat. 1941, chap. 83, par. 17) states that actions on bonds, promissory notes and the like shall be commenced within ten years after the cause of action accrued. It will be noted that it applies entirely to the remedy and nothing therein indicates that it was the legislative intention that the debt should be extinguished, and in fact under the reasoning of Newland v. Marsh, supra, to hold that the debt was extinguished would be to render the Limitations Act void.

Counsel for appellants argue that as nothing was said in the will of the testatrix regarding the payment of these notes, it cannot be said that it was her intention to have them taken from the interest of the appellants. The facts are, however, that she caused the appellants to issue notes representing their indebtedness, thus evidencing an expectation that the obligations would be repaid; and the fact that she gave appellants an equal share with the other seven distributees, at least six of whom were in equal degree of relationship to the testatrix, is also an indication that it was within her contemplation that appellants pay their notes. The will was executed on October 27, 1927. At that time these notes were but a few months past due and it can scarcely be said that failure to make reference to them in the will is to be taken as evidence that the testatrix did not intend that they should be paid.

Counsel argue that had the testatrix been alive she could not recover on the notes if appellants chose to affirmatively plead the statute of limitations, and this is true. However, should that situation have arisen, the testatrix would have had an opportunity to correct it by the terms of her will.

The right of an executor to deduct such an indebtedness is based upon the equitable principle that no one should be permitted to share in a fund until he has discharged his obligation to contribute to that fund. Here appellants already have funds of the estate in their hands in the form of indebtedness owed to it. To allow them to escape payment of their debt and at the same time receive a full distributive share of the estate, would serve to increase their share by the amount of their indebtedness. There is nothing to indicate that the testatrix in-

tended such a result. On the contrary, her will evidences an intention to equally divide her estate.

As stated, the authorities in other jurisdictions are not in agreement, but without citing and analyzing cases on both sides of the question, we are of the opinion that the weight of authority, better reasoning and more equitable solution of the problem lies in the view indicated in Jeffers v. Jeffers, supra, and that the executor has the right to deduct debts of legatees though suit for same be barred by the statute of limitations.

We are of the opinion that in this case it was and is the duty of the executor to inventory these notes as a part of the estate and from one-ninth of the total estate, which was the share of each of appellants, to deduct the amount of his debt. The Appellate Court was right in the conclusion reached and its judgment is affirmed.

LIABILITY OF SURVIVING CO-MAKERS

Daniel v. Wilhoit, State Banking Com'r, Court of Appeals of Kentucky, 158 S. W. Rep. (2d) 153

The co-maker of a negotiable note died and his estate was duly administered according to law. The bank holding the note, however, failed to file its claim with the estate. In an action on the note against the co-makers, it was alleged as a defense that one of the co-makers had died, that his estate was probated, that no claim was filed with the estate, and that the note sued upon was a renewal note for an obligation of the deceased. It was held that the allegations were irrelevant and did not constitute a defense.

Action on a note by Hiram Wilhoit, State Banking Commissioner of Kentucky, against Lena W. Daniel and others, who filed counterclaims and set-offs. From a judgment for plaintiffs, defendant Lena W. Daniel appeals and other defendants move for an appeal.

On appeal of Lena W. Daniel judgment affirmed, and other defendants' motions overruled and judgment affirmed.

C. R. Luker, of London, for appellants.

Murray L. Brown, of London, for appellee.

REES, J.—On December 21, 1938, the board of directors of the Farmers State Bank, a corporation organized under the laws of Kentucky and conducting a banking business at London, Kentucky, placed the bank in the hands of the state banking commissioner for liquidation.

NOTE—For similar decisions see Banking Law Journal Digest (Fifth Edition) §§761, 832.

On March 2, 1940, Arlie Magee was appointed special deputy banking commissioner to liquidate the affairs of the bank. Among the assets of the bank the commissioner found a note of $300, dated November 12, 1938, and due six months thereafter with interest at the rate of 6 per cent per annum from its date, signed by the appellants, Daniel's Cash Store, Lena W. Daniel, and Virginia Daniel. On May 1, 1940, the banking commissioner brought suit upon the note in the Laurel circuit court. The defendants filed an answer, counterclaim, and set-off which was later amended. A demurrer to this pleading was sustained, the defendants declined to plead further, the answer, counterclaim, and set-off as amended was dismissed, and judgment was entered in favor of the plaintiff for $300, with 6 per cent interest from November 12, 1938. The defendant Lena W. Daniel has appealed, and each of the remaining defendants has filed a motion for an appeal.

In paragraph one of the answer, counterclaim, and set-off the defendants admitted execution of the note. In paragraph two it was alleged that R. Daniel, husband of Lena W. Daniel, died intestate October 16, 1935; that at the time of his death he was operating a business under the assumed name of Daniel's Cash Store; that Lena W. Daniel qualified as administratrix of the estate of her deceased husband; and that the personal property of R. Daniel, deceased, was appraised at $3,800. It was also alleged that he left real estate of the value of $3,750 on which there was a mortgage of $2,766.74. It was further alleged that the note sued on was a renewal of a note owing by R. Daniel at the time of his death; that the Farmers State Bank had never filed a claim with the administratrix of R. Daniel's estate; and that she had made a final settlement as administratrix on September 29, 1939. It was further alleged that Daniel's Cash Store was out of business, and that Lena W. Daniel was conducting the business of Daniel's Department Store and had been operating same as the sole owner thereof since November 17, 1939. In paragraph three of the answer, counterclaim, and set-off it was alleged that the note sued on was signed by Lena W. Daniel and Virginia Daniel as sureties for the estate of R. Daniel; that it was merely a renewal note; and that it was understood by the Farmers State Bank that neither Lena W. Daniel nor Virginia Daniel would be personally liable. In paragraph four Lena W. Daniel undertook to plead as a set-off an alleged claim against the bank for $500. She alleged that on June 29, 1936, she purchased from the bank $500 of its preferred B stock and paid cash therefor; that the officers of the bank at the time she purchased the stock falsely and fraudulently represented to her that the bank was solvent; that she relied on their statements; and that said representations were false and untrue. She further alleged that soon after she purchased the stock she learned that it was of no value, and that the bank was in-

solvent. She asked for a judgment in the sum of $500, with interest thereon from June 29, 1936. In the amended answer, counterclaim, and set-off only the allegations of paragraph four of the answer, counterclaim, and set-off were materially changed. In the amendment Lena W. Daniel alleged that she purchased the five shares of stock a few months before the bank was closed; that its insolvency had existed for more than five years prior to the purchase of the stock, but she did not learn of its insolvency until it was placed in the hands of the banking commissioner for liquidation.

The matter pleaded in paragraph two of the answer is wholly irrelevant and appellants have failed to point out wherein it constitutes a defense. The defense pleaded in paragraph three is the alleged agreement made at the time the note was signed that Lena W. Daniel and Virginia Daniel would not be liable thereon. The instrument is clear and unambiguous in its terms, and imports on its face an absolute promise to pay by each of the appellants. Evidence of an oral agreement prior to, or contemporaneous with, the execution and delivery of a promissory note is not admissible to vary or contradict the written instrument. In the early case of Dale v. Pope, 4 Litt. 166, the rule was announced that where the note is for the absolute and unconditional payment of money it cannot be defeated by alleging and proving that it was not to be paid except on a contingency. In Fechheimer v. Goldnamer, 169 Ky. 243, 183 S. W. 541, it was held that, in the absence of averments of fraud or mistake, so much of the petition as set up a parol contemporaneous agreement that the note should not mature at the time stated therein was properly stricken, since without such averment the terms of the instrument could not be varied or contradicted by prior or contemporaneous parol agreements. In Stewart v. Gardner, 152 Ky. 120, 153 S. W. 3, 6, a defense similar to the defense invoked in the present case was pleaded, but was disallowed. The court said: "In the instant case the defendants are sensible, intelligent men. They knew when they executed the notes that they were entering into an unconditional promise to pay the money therein specified. They did not allege or prove by clear and convincing evidence that any fraud was practiced on them, or that the notes were executed by mistake. It is simply an attempt to vary the terms of two written contracts by contemporaneous parol declarations. This cannot be done."

Among other cases to the same effect are Wilhoit v. McCubbin, 250 Ky. 60, 61 S. W. 2d 897; Davis v. Poulos, 237 Ky. 763, 36 S. W. 2d 373; Phelps v. Home Owned Stores, 242 Ky. 531, 46 S. W. 2d 1090.

The set-off in paragraph four was pleaded only by the defendant Lena W. Daniel. The claim, if valid, was hers alone. A demand, to be the subject matter of set-off, must be mutual between all the parties to the action; that is, the claim must be due to and from the same parties

and in the same capacity. 24 R. C. L. 858; Lee v. Russell, 38 S. W. 874, 18 Ky. Law Rep. 951; Supreme Liberty Life Insurance Company v. Ridley's Adm'r, 261 Ky. 403, 408, 87 S. W. 2d 940, 101 A. L. R. 1511. In Lee v. Russell [38 S. W. 875, 18 Ky. Law Rep. 951] it was said: "As a question of pleading, 'the original cause of action sued on and a set-off must be mutual demands between the same persons, and in the same right. A joint debt cannot be set off against a separate demand, nor a separate demand against a joint one.' "

We conclude that the demurrer to the answer, counterclaim, and set-off as amended was properly sustained, and the motion for an appeal of Virginia Daniel and Daniel's Cash Store is overruled, and the judgment as to them is affirmed. The judgment is also affirmed on the appeal of Lena W. Daniel.

ACKNOWLEDGMENT OF DEBT MADE TO CREDITOR OR AGENT

Peoples Bank & Trust Co. v. Tar River Lumber Co., Supreme Court of North Carolina, 19 S. E. Rep. (2d) 138

The acknowledgment of or promise to pay a debt, which is required by statute in order to take the debt out of an applicable statute of limitations must be made to the creditor himself or to an attorney or agent of the creditor acting on behalf of his principal.

In this case a letter accompanied by the financial statement of a debtor corporation listed a note held by the creditor among its liabilities. The letter was sent by the secretary-treasurer of the debtor to a bank which acted as financial agent for the creditor. The bank, however, was also attempting to collect from the debtor the bank's own claim against a subsidiary of the debtor. It was held that the letter was not sent in connection with any business of the creditor and hence did not constitute an acknowledgment under the statute sufficient to revive the debt which had been barred by the statute of limitations. Moreover, the secretary-treasurer of debtor corporation did not have power to bind the corporation by such acknowledgment so as to revive the debt.

Civil action in receivership by the Peoples Bank & Trust Company, General guardian of W. L. Groom, against Tar River Lumber Company, wherein Ida Baker Hanes filed her claim against the defendant evidenced by two promissory notes. From a judgment disallowing her claim, Ida Baker Hanes appeals.

Judgment affirmed.

NOTE — For similar decisions see Banking Law Journal Digest (Fifth Edition) §1406.

Civil action in receivership heard upon claim of Ida Baker Hanes filed with, and denied by receivers.

In the trial court, upon hearing on exceptions of Ida Baker Hanes, to report of receivers of defendant, Tar River Lumber Company, filed at September Term, 1941, in which they decline to approve her claim, represented by two notes of defendant, for that same are barred by statutes of limitations, the parties stipulated that the judge should find all facts with the same effect as if determined by a jury and render judgment thereon.

Ida Baker Hanes offered in evidence these documents: 1. Two notes executed in name of Tar River Lumber Company, by W. L. Groom, president; one, date March 18, 1924, payable to Ida Baker Hanes for $5,000, two years after date, with interest at 6 per cent per annum, payable semi-annually; and the other dated August 4, 1926, payable to Howard E. Baker for $10,000 two years after date, with interest at 6 per cent per annum, payable semi-annually, bearing on back this endorsement: "Pay to the order of Ida B. Hanes without recourse, First National Bank & Trust Company of Elmira, by O. N. Reynolds, V. P. as Executor of the estate of Howard E. Baker, deceased."

2. Two letters, signed in name of "Tar River Lumber Company by S. T. Anderson," purporting to be on letterhead stationery of "Tar River Lumber Company, Inc., Wholesale and Retail Dealers in Kiln Dried North Carolina Pine, Poplar and Oak" showing as officers: "W. L. Groom, Pres. and Gen. Mgr., S. T. Anderson, Secy. and Treas., W. T. Keeton, Vice Pres."

The first letter, dated Rocky Mount, N. C., Feb. 18, 1939, addressed to Mr. M. D. Thompson, c/o First National Bank & Trust Company, Elmira, N. Y." reads as follows: "Complying with the request of Mr. I. T. Skeels, Assistant Vice President, we beg to herewith hand you copy of our annual financial statement as of Jan. 1st, 1939. If any explanation needed, we will be glad to give the best we can." Attached to and enclosed in this letter was a financial statement of all assets and liabilities of the Tar River Lumber Company as of January 1, 1939, the only pertinent part being "Liabilities" listed as "notes payable to stockholders, W. L. Groom $62,077.79, H. E. Baker, dec. $14,087.00, and Ida B. Hanes $6,205.20," total "$82,369.99."

The other letter, dated Rocky Mount, N. C., February 15, 1940, addressed to "Mr. George H. Wood, C. P. A., Pasadena, Calif.," reads as follows: "We acknowledge yours of February 7th with reference to $5,000.00 note held by Mrs. Ida B. Hanes. This note is included in our liabilities as shown by books. As to its value and time of payment, we are unable to advise. The writer does not feel you would be justified in considering income from this note for income tax returns."

The parties stipulated that on February 18, 1939, the First National

Bank & Trust Company of Elmira, N. Y., was "the financial agent of Mrs. Ida Baker Hanes, and also a creditor of Tar River Lumber Company, or its subsidiary, Swansboro Land & Lumber Company."

The receiver offered evidence tending to show substantially these facts:

The Tar River Lumber Company, originally a co-partnership, composed of W. L. Groom, Howard E. Baker and J. H. Harris, was incorporated in 1908 by them and others, including Ida Baker Harris, daughter of Howard E. Baker, and S. T. Anderson, who owned two shares. Groom was elected president, Baker, treasurer, and Anderson, secretary. Subsequently, upon death of Baker, the offices of secretary and treasurer were combined, and Anderson was elected. Under the by-laws of the corporation, the president was empowered to exercise general supervision and direction over the affairs and all other officers of the corporation. The by-laws, pertaining to duties of secretary and of treasurer, further provided that the secretary "shall keep the proper books of account, and discharge such other duties as pertain to his office and as are prescribed by the board of directors." In recent years the board of directors was composed of W. I. Groom, now deceased, who for eight or ten years was in bad health, and whose general guardian instituted this action, W. T. Keaton, formerly of Elmira, New York, now of Florida, Mrs. K. J. Harris, of New York, and S. T. Anderson, of the office of company.

Anderson testified, in part, as follows: "How long Mr. Groom was in bad health is hard to say, but he was . . . 8 or 10 years. . . . As he went down I naturally took hold without authority. I paid the bills when I had the money. I collected the money and made sales to customers. As long as he could do it he handled as much of the general management of the business as he could. After he got so he couldn't, the burden fell on me. During 1939 and 1940, I was not absolutely in complete charge. I can't carry dates very well but I shouldn't say over a year and a half or maybe a year that he had been totally incapacitated. On February 15, 1940, Mr. Groom was not absolutely able to attend to his duties. For the last four or five years Mr. Groom hasn't been able to attend to a lot of things. It is hard for me to answer the question whether if on February 15, 1940, I was not for all general purposes the head of the business. I was there and he was sick. I was doing the best I could with it. Conditions were not as bad on February 18, 1939, as in 1940. I was there and so was he and what he could not do I tried to do . . . The directors met very seldom. Years ago we had stockholders and directors meetings once a year . . . we ran along several years without meeting . . . I think they met in the last two years. Mrs. Harris didn't come down to the meeting. She resigned as a director. I think Mr. Keaton was here. At the time the payment was made on my note

and Mr. Groom's note was renewed (in 1939, he thinks) Mr. Groom and I were the active managers of the business. We didn't renew Mrs. Hanes' notes . . . I have never at any time signed a note for the corporation."

Anderson further testified that in February, 1939, the Swansboro Land & Lumber Company, of which Groom was largest stockholder, and in which the Harris family had stock, but in which the Baker family had none, was indebted to both the Tar River Lumber Company and the First National Bank of Elmira, New York; that under an arrangement pertaining to timber contract between Tar River Lumber Company and Swansboro Land & Lumber Company, the former was to make certain payments to the bank; and that from then on frequent statements were submitted to the bank in connection with the indebtedness to it. The witness further testified that "at end of each year we made financial satements of the Tar River Lumber Company and perhaps the First National Bank of Elmira, New York, got copies of those statements"; and, further, that neither the president nor directors authorized him to acknowledge any of the corporation's indebtedness to other people; that in 1939 the corporation executed renewal notes for indebtedness to Groom and same were signed by Groom as president and by him as secretary,—which he thinks was pursuant to a resolution of the board of directors; and that "the question of renewing Mrs. Hanes' notes was discussed between the president of the corporation and me, and Mr. Groom chose not to renew them."

Upon stipulations and admission in open court, and from documentary and oral evidence presented, the court finds pertinent facts substantially these: 1. Ida Baker Hanes is the holder of the two notes offered in evidence, on which interest has been credited to September 18, 1930, and to February 4, 1927, respectively. After the dates to which interest has been so credited, no payments have been made on either of the notes.

2. That, "On February 18, 1939, S. T. Anderson, who was Secretary-Treasurer of Tar River Lumber Company, sent to Mr. D. Thompson, an officer of First National Bank & Trust Company, of Elmira, N. Y., a financial statement of Tar River Lumber Company, which listed said notes under the heading 'notes payable to stockholders.' The First National Bank & Trust Company of Elmira was the financial agent of Ida Baker Hanes, but was also a holder of stock in Tar River Lumber Company as collateral to loans and was the holder of notes of Swansboro Land & Lumber Company, a subsidiary corporation of Tar River Lumber Company, and was endeavoring to collect the notes of Swansboro Land & Lumber Company through payments by Tar River Lumber Company of the proceeds of timber owned by Swansboro Land & Lumber Company, which was being cut and sawed by Tar River Lumber Company. The

letter of Anderson to the Bank, and the financial statement which accompanied his letter, were not sent to the Bank in connection with any business of Ida Baker Hanes."

3. That, "On February 15, 1940, S. T. Anderson, Secretary-Treasurer, on behalf of Tar River Lumber Company, wrote to Geo. H. Wood, Pasadena, California, who is the personal auditor of Ida Baker Hanes, a letter," offered in evidence.

4. That, "The by-laws of Tar River Company provide that its president shall be its active managing official."

5. That, "The by-laws of Tar River Lumber Company define the duties of the secretary and the treasurer, but do not give either of said officers any authority to borrow money or pledge the credit of the corporation or to make or alter contracts of the corporation, and no such authority was given to Anderson by any resolution of the Board of Directors as he did not in fact exercise such authority."

6. That, "There has been no unconditional acknowledgment in writing within the statutory period of the indebtedness of Tar River Lumber Company to Ida Baker Hanes on the notes referred to."

7. That, "S. T. Anderson, as secretary and treasurer of said corporation did not have power to bind the corporation by such an acknowledgment if the correspondence hereinabove set out should be construed as constituting such an acknowledgment."

Upon these findings of facts, the court, being of opinion that the claim of Ida Baker Hanes is barred by the statutes of limitations, adjudged that it be disallowed as claim against the assets of the Tar River Lumber Company now or hereafter distributable by the Receivers.

The claimant, Ida Baker Hanes, appeals to Supreme Court and assigns error.

S. L. Arrington, of Rocky Mount, for appellant Ida Baker Hanes.

Battle, Winslow & Merrell, of Rocky Mount, for appellee receivers.

WINBORNE, J.—A jury trial having been waived, and the parties having consented that the judge find the facts, the findings of fact, supported by competent evidence, are as conclusive as if found by a jury, and are not subject to review by this Court. Branton v. O'Briant, 93 N. C. 99; Roberts v. Life Ins. Co., 118 N. C. 429, 24 S. E. 780; Matthews v. Fry, 143 N. C. 384, 55 S. E. 787; Cox v. Boyden, 175 N. C. 368, 95 S. E. 548; Tyer v. J. B. Blades Lbr. Co., 188 N. C. 268, 124 S. E. 305; Tinker v. Rice Motors, 198 N. C. 73, 150 S. E. 701; Brown v. Tennessee Coal Co., 208 N. C. 50, 178 S. E. 858; Schoenith, Inc. v. Adrian Mfg. Co., 220 N. C. 390, 17 S. E. 2d 350; Bangle v. Webb, 220 N. C. 436, 17 S. E. 2d 613.

Upon perusal of the evidence shown in the record on this appeal, we are unable to say that there is no competent evidence to support

each essential finding of fact. The weight of such evidence is for the judge, acting in lieu of jury, to determine.

The question, therefore, presented by appellant for decision is reduced to this: Do the letters, either or both, introduced in evidence by creditor, constitute an acknowledgment of the indebtedness sufficient to take the debt out of the operation of applicable statutes of limitations?

The statute, originally enacted in 1868, provides that "No acknowledgment or promise is evidence of a new or continuing contract, from which the statutes of limitations run, unless it is contained in some writing signed by the party to be charged thereby. . . ." C. S. § 416, formerly C. C. P. (1868), Section 51, The Code of 1883, Section 172, The Revisal 1905, Section 371.

Apart from the requirement that the acknowledgment or promise should be "contained in some writing signed by the party to be charged," the statute, according to decisions on the subject, does not change the character and quality of the acknowledgment or promise theretofore required to repel the statutes of limitations. Taylor v. Miller, 113 N. C. 340, 18 S. E. 504; King Bros. Shoe Store Co. v. Wiseman, 174 N. C. 716, 94 S. E. 452; Phillips v. Giles, 175 N. C. 409, 95 S. E. 772.

Decisions of this Court, both before and since the enactment of the statute, C. S. 416, pertinent to the true interpretation of the law, as stated by Hoke, J., in Phillips v. Giles, supra, are to the effect that in order to revive a debt which is barred by statutes of limitations there should be an express, unconditional promise to pay the same, or there should be a definite, unqualified acknowledgment of the debt as a subsisting obligation and from which the law will imply a promise to pay. Mastin v. Waugh, 19 N. C. 517; Smith v. Leeper, 32 N. C. 86; Simonton v. Clark, 65 N. C. 525, 6 Am. Rep. 752; Faison v. Bowden, Ex'r, 72 N. C. 405; Taylor v. Miller, supra; King Bros. Shoe Store Co. v. Wiseman, supra; Smith v. Gordon, 204 N. C. 695, 169 S. E. 634, and numerous other cases.

Moreover, it is further declared in Phillips v. Giles, supra [175 N. C. 409, 95 S. E. 774], that the principle generally prevailing on the subject, and required by the phraseology of the statute itself, C. S. § 416, "clearly recognizes that either a promise to pay or acknowledgment of the debt as an existing obligation will suffice, unless there be something to qualify the express promise or to repel that which the law would imply from the definite acknowledgment of the debt as a subsisting obligation."

An acknowledgment or a promise is, in the wording of the statute, required to be "contained in some writing signed by the party to be charged." It would be sufficient, however, if the party to be charged be a corporation, that the writing be signed in the name of, or on behalf of the corporation by an authorized agent or officer.

Furthermore, in order to take the debt out of an applicable statute

of limitations, an acknowledgment or a promise must be made to the creditor himself. Thompson v. Gilreath, 48 N. C. 493; Parker v. Shuford, 76 N. C. 219; Faison v. Bowden, supra; Hussey v. Kirkman, 95 N. C. 63, or to an attorney, or to an agent of the creditor acting on behalf of his principal, Kirby v. Mills, 78 N. C. 124, 24 Am. Rep. 460; Shaw v. Burney, 86 N. C. 331, 41 Am.Rep. 46; Pope v. Andrews, 90 N. C. 401.

Applying these principles to the facts as found by the court below, the claim of appellant is confronted with insurmountable obstacles in the way of escape from the operation of statutes of limitations.

In the first place, the letters contain no express, unconditional promise to pay the notes in question. Secondly, if the letters as expressed, with accompanying financial statement, if authorized, be sufficiently definite and explicit as to amount to an unqualified acknowledgment of the debt as a subsisting obligation, from which the law may imply a promise to pay, Darling v. Brown, 1 Canada 360, relied upon by creditor, findings of fact as to authoritative communication are lacking. The court below finds as facts, (1) that even though the First National Bank & Trust Company of Elmira, New York, were the financial agent of creditor, it was also the holder of notes of Swansboro Land & Lumber Company, a subsidiary corporation of debtor, and the financial statement was not sent to the bank in connection with any business of creditor, and that (2) even though the correspondence (letters) should be construed as constituting an acknowledgment, the secretary and treasurer, who signed the letters, did not have power to bind the corporation by an acknowledgment. The evidence offered is susceptible of such influence, and is sufficient to support the findings.

ACCEPTANCE OF LATE PAYMENT DID NOT CONSTITUE WAIVER OF DEFAULT OR REINSTATEMENT OF NOTES

Herweck's Paint & Wallpaper Co. v. C. I. T. Corporation, United States Circuit Court of Appeals, 123 Fed. Rep. (2d) 989

Where payee accepted payment of past due installments on notes, it was held that payee did not necessarily waive default nor reinstate the notes.

In this case three installment notes matured and remained unpaid. After the payee started suit against the makers of the notes, the makers paid the past due installments. Despite these payments,

NOTE — For similar decisions see Banking Law Journal Digest (Fifth Edition) §§850, 851.

however, the payee proceeded with the suit to recover the unpaid balance. It was held that there was no evidence to show that the payee had waived the maturity which had ensued under an acceleration clause for default in the installment payments and reinstated the notes to their original status. Consequently, the payee was entitled to judgment for the amount due and unpaid on them.

Appeal from the District Court of the United States for the Western District of Texas; Robert J. McMillan, Judge.

Action by the C. I. T. Corporation against the Herweck's Paint & Wallpaper Co. and others, to recover on notes and for fraud. From a judgment for plaintiff, defendants appeal.

Affirmed.

Leonard Brown and W. C. Williams, both of San Antonio, Tex., for appellants.

Woodville J. Rogers, of San Antonio, Tex., for appellee.

HUTCHESON, C. J.—The suit was against appellants and one other to recover against them as partners, (a) the amount of three notes of which the partnership was maker, and (b) for damages for fraud and deceit in connection with the endorsement by the partnership without recourse of several other notes in which it was the payee. The claim as to the three notes was that they had been matured and suit brought on them for failure to pay installments due on them. The claim as to the other notes was that defendants through one Patterson acting as their agent had negotiated the notes by fraudulent representations as to the solvency and credit rating of the makers.

The defense against the three notes was that though the notes had been matured for default in installments, these installments had been paid, the default had been waived, and the notes had been reinstated as not past due. The defense against the claimed damages for fraud was not, that false and fraudulent representations had not been made by Patterson, but that in making them, Patterson was not the agent of defendants, but was acting for himself as contractor, and that wholly ignorant of any fraud or wrongdoing, and as an accommodation to him, they had innocently allowed the notes to be made payable to them and had innocently received and disbursed their proceeds. In addition to these defenses common to all of the defendants, Louise Herweck set up her coverture, as the wife of H. Herweck, and the defendant, Louise Frances Herweck, set up hers at the time of the filing of the suit and the non-joinder of her husband. The case was tried to the court without a jury and upon the evidence including proof that Mrs. Louise Herweck's disabilities of coverture had been removed, there was a dismissal as to Louise Frances Herweck, and a judgment against the other defendants as makers of the three notes and for damages for fraud on

account of several, but not all of the notes they, as payees, had endorsed without recourse.

Appellants are here insisting that the judgment was wrong throughout and should be reversed. Appellee points to the findings of fact of the trial court;* that appellants were partners; that the three notes of which they were the makers, were past due and unpaid; and that the other notes of which they were the payees, were fraudulently negotiated by Patterson, the agent of defendants, to deliver them and receive the proceeds. It insists that the findings are sustained by the evidence and that the judgment was right and must be affirmed. We agree with the appellee. As to the three "maker" notes, the record does show that after suit filed, plaintiff accepted payment of past due installments. Nothing in the record, however, contradicts, all of its supports the finding of the district judge that the default was not waived, the notes were not reinstated and that plaintiff is entitled to judgment for the amount due and unpaid on them. As to the notes in which defendants were payees, while it is perfectly clear as found by the district judge, that defendants were neither parties to, nor cognizant of Patterson's fraud, it is equally clear as found by him, that Patterson was their agent and that he did the fraudulent things he did, and made the fraudulent statements that he made, within the scope of the authority they conferred on him to obtain the money on the notes for them.

The fact that they endorsed the notes without recourse is of no significance as a defense to the suit brought. The suit is not upon the notes but upon the fraud in procuring their negotiation. The evidence

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*These may be briefly summarized: (1) Defendants were partners. (2) The three notes on which they were sued as makers, had been matured before suit was filed, the maturity had not been waived, and the notes had not been reinstated. (3) With regard to four of the notes for which damages for fraud were claimed, plaintiff's proof had failed. (4) With regard to the others, false and fraudulent representations of material fact in respect to each, were made to the plaintiff by Patterson with the intent and design to induce the plaintiff to purchase the notes and that plaintiff relied upon these representations as being true and but for them would not have purchased the notes. (5) Patterson who made these representations procured the notes from the makers payable to the defendants on F. H. A. Forms, with the knowledge, consent and approval of defendants. (6) These notes were endorsed without recourse by the defendants and placed in the hands of Patterson that he might deliver them to the plaintiff and receive the payment therefor, and Patterson delivered the money received for the notes to the defendants who deposited them in their bank account. (7) Patterson at the time he delivered the notes to the plaintiff knew that credit statements would be required, and that the notes would be purchased without credit statements and he made misrepresentations of fact to plaintiff and altered and changed credit statements in material representations and completely forged some statements. (8) Though the defendants did not know that Patterson intended to or would or did make such representations at the time they were made, he was the agent of the defendants for the purpose of effecting a disposition of the notes to the plaintiff and for the purpose of receiving the proceeds from the sale of the notes from the plaintiff and delivering the same to defendants. (10) Defendant, Louise Herweck, is a married woman but her disabilities of coverture have been removed and for the purpose of the law suit she is a feme sole.

shows without dispute that the defendants furnished the paint and advanced the pay rolls, for each of the jobs evidenced by each of the notes involved in the fraud claims, and that except such amount, if any, as was due Patterson as contractor (and the evidence does not disclose what, if any, amount there was), all of the proceeds of the notes were paid to and appropriated by defendants. The evidence further shows that but for the fraudulent representations of Patterson, the notes would not have been accepted and the money paid. In these circumstances where one of two innocent persons must suffer, the law, upon the plainest principles and without wavering, puts the burden not upon the innocent third party, with whom the agent dealt for his principal, but upon the principal who has clothed him with authority to deal, and who has obtained and kept the fruits of his dealing. Re-Statement Agency, Sections 257-8; 261-2; F. S. Royster Guano Co. v. Hall, 4 Cir., 68 F. 2d 533; 2 Am. Jur., Page 282-3, Section 362-3.

MANDATORY PROVISION DIRECTING TRUSTEE TO INVADE PRINCIPAL OF TRUST

Brummett v. Hewes, Supreme Judicial Court of Massachusetts, 40 N. E. Rep. (2d) 251

A provision in a will directed that when the balance of net income payable to testator's daughter in any year after the first year is less than $12,000 the trustees "shall" pay to her enough from the principal to make up that sum. Another provision of the will permitted the executor and the trustees to continue the testator's investment in a corporation and allowing them to act in that regard "as they might deem best." It was held that the latter provision was of little weight in construing the donative part of the will and it seemed evident that the provision for the payment of principal to testator's daughter would be construed as mandatory. The word "shall" in its accurate sense is a word of command.

Suit by John L. Brummett and others, trustees under the will of James A. Hewes, deceased, against Bessie C. Hewes and others, for instructions. On appeal and report from a decree of the Probate Court.

Decree reversed and decree directed to be enterd.

A. L. Brown, of Boston, for petitioner.

J. Wiggin and J. A. Plummer, both of Boston, for respondent Hewes.

J. G. Wright, of Boston, for next friend.

NOTE — For similar decisions see Banking Law Journal Digest (Fifth Edition) §527.

QUA, J.—The trustees under the will of James A. Hewes, late of Melrose, pray instruction as to whether they are bound to pay to the testator's daughter, Bessie C. Hewes, the sum of $1,000 per month "regardless of whether the income of the trust is sufficient to pay this sum." Other questions upon which they seek instruction are subsidiary to the foregoing and need not now be stated.

The paragraphs of the will bear no numbers in the original will, but for convenient reference those disposing of the testator's property will here be treated as if numbered consecutively.

Paragraph 1 gives to the testator's daughter, Bessie C. Hewes, all his household effects, clothing, jewelry, personal articles and automobiles.

Paragraph 2 orders the executors to pay to Bessie during the first year after the testator's decease such sums out of income "as in their judgment may be necessary and proper for her suitable and reasonable support in the manner she has been accustomed to," and if income is insufficient to pay the same from principal.

Paragraph 3 states that the will is made in contemplation of marriage between the testator and Mrs. Rose E. Everett and orders the executors to pay to Mrs. Everett during the first year $1,000 per month "out of the income or principal of my estate as stated in the foregoing provisions for my said daughter."

Paragraph 5 creates the trust and provides for the payment from the income of $1,000 monthly to Mrs. Everett during her lifetime.

Paragraph 6 provides for the payment of the balance of the income to Bessie during her life.

Paragraph 7 is as follows: "In case, however, that the balance of net income payable to my said daughter Bessie in any year after the first year from the date of my decease is less than Twelve Thousand Dollars ($12,000), then for any year after said first year that said net income payable to my said daughter is less than Twelve Thousand Dollars ($12,000), my said Trustees shall pay to my daughter from the principal of the trust a sufficient sum to make the sum received by my said daughter equal to Twelve Thousand Dollars ($12,000) annually."

Paragraphs 8 and 9 deal with the disposition of the income and the ultimate distribution of the principal after the deaths of Bessie and Mrs. Everett. Paragraph 8 includes a provision for monthly payments from income to Mary F. Upton and Mary L. Mason during their respective lives.

Paragraph 10 reads: "I authorize and empower my said Trustees, or their successors, to pay to my said daughter Bessie and to said Mrs. Rose E. Everett in case that she shall become my widow, such portions of the principal of the trust estate as in the unanimous judgment and discretion of the Trustees for the time being seems reasonable, expedient and proper in case the income from the trust estate in any year

seems insufficient for their reasonable and proper support and maintenance in the way and manner they have been accustomed to considering all the then facts and circumstances, and the decisions of said Trustees concerning such payments of principal to or for the benefit of my said daughter Bessie and to said Mrs. Rose E. Everett in case that she shall become my widow, shall be final and binding upon all parties and be beyond appeal."

Paragraph 11 reads: "In case that the net income of my estate at any time is not sufficient to pay the monthly payments as herein provided for to my said daughter Bessie, to Mrs. Rose E. Everett, to my said sister Mary F. Upton, and to said Mary L. Mason, then I authorize the Trustees for the time being to make up such deficiency of said payment from the principal of said trust estate and any such deficiency so paid out of the principal shall not be replaced to the principal out of future income and the necessity for such payments out of principal shall rest entirely upon the judgment and discretion of said Trustees, and their action shall be final and beyond appeal."

Paragraph 12 recites the testator's active interest in Hewes and Potter Incorporated, in which he states that the greatest part of his estate is invested. He expresses his desire to see the corporation's business continue and prosper. He requests and authorizes his executors and trustees "to continue" his "interest" therein as long as in their judgment they may safely do so, "giving them full power to so act using a wise discretion." He requests them so to manage his investment in that corporation that besides obtaining a satisfactory income therefrom the interests of his "long time friends connected with said Corporation will be favored and conserved and not injured by the hasty or untimely withdrawal or sale of . . . [his] shares." He adds, however, that he leaves his executors and trustees "to act in these matters as they may deem best," and that he imposes "no trust upon them, express or implied."

Other provisions of the will, in our view, have little or no bearing on the issues, and need not be stated. All have been considered. Mrs. Everett died before the testator, and the issue now lies between the testator's daughter, Bessie C. Hewes, and possible remaindermen who may take income or principal after her death.

Bessie C. Hewes relies upon the seventh paragraph as rendering it mandatory upon the trustees to pay to her from principal a sufficient sum to make the amount received by her $12,000 annually, whenever the sum payable to her out of income is less than that amount. On the other hand, it is the contention of the next friend appointed by the Probate Court to represent persons not ascertained or not in being that other parts of the will, taken together, and especially the eleventh paragraph, show that the testator intended that any payments to his daugh-

ter out of principal should (to quote from that paragraph) "rest entirely upon the judgment and discretion" of his trustees; and that if there is a repugnancy between the seventh and the eleventh paragraphs the latter, coming later in the will, must be deemed the final expression of the testator's intention.

Paragraph 7 is certainly mandatory in form. It directs that when the balance of net income payable to Bessie in any year after the first year is less than $12,000 the trustees "shall" pay to her enough from the principal to make up that sum. "Shall," in its accurate sense, is a word of command. McCarty v. Boyden, 275 Mass. 91, 93, 175 N. E. 292; Elmer v. Commissioner of Insurance, 304 Mass. 194, 196, 23 N. E. 2d 95. By paragraph 5 the testator had given Mrs. Everett $12,000 a year out of income. By paragraph 6 he had given Bessie only "the balance" of the income. We do not know the size of the estate, but unless some provision had been made by which Bessie could look to principal it would seem that she might in a period of low income receive little or nothing while Mrs. Everett remained in a preferred position. There is nothing in the will as a whole to indicate that the testator thus intended to subordinate his daughter to the woman whom he intended to marry. Notwithstanding some differences between the provisions made for them respectively the will seems rather to indicate the testator's desire for substantial equality in his treatment of these two principal objects of his bounty. If the will stopped with paragraph 7 it seems plain that the provision for the payment of principal to Bessie would be construed as mandatory. It would require clear and unequivocal expression of a contrary intent or a repugnancy that could not plausibly be explained away to overcome a provision so plain, straightforward, and apparently reasonable as that contained in paragraph 7.

We do not find such controlling language in the rest of the will. There is nothing of the kind in paragraph 10. This simply authorizes the trustees, by unanimous action, to pay from principal to Bessie and to Mrs. Everett, if she should become the testator's widow, sums in excess of the $12,000 previously provided for each if, "considering all the then facts and circumstances," that sum seems insufficient for their support in the manner to which they have been accustomed. The wording of this paragraph may fit in somewhat more aptly with the wording of the previous provision for Mrs. Everett than with that for Bessie but this is far from enough to control paragraph 7.

The main argument in behalf of the remaindermen must rest upon paragraph 11, the discretionary provision of which is claimed to be repugnant to an absolute right in Bessie to resort to principal under paragraph 7. It therefore becomes necessary to inquire into the precise meaning of paragraph 11. That paragraph by its terms operates only in case "the net income of . . . [the] estate at any time is not sufficient

to pay the monthly payments" provided in the will for the persons named in paragraph 11. Bessie is named in that paragraph. None of the payments provided in the will for Bessie is expressed to be payable monthly, but if we can assume that monthly payments are somehow implied there is still difficulty in applying paragraph 11 to the payments from the trustees provided for Bessie by paragraphs 6 and 7. The payment provided by paragraph 6 is a payment of "the balance of said net income," and of course "the net income of . . . [the] estate" can never be "not sufficient" to pay the balance of the net income. The payment provided by paragraph 7 is therein expressly required to be paid out of principal. How can the "net income" be "not sufficient" to make payments which are only to be made out of principal and never out of income? Paragraph 11 is perfectly plain as applied to all the persons named therein except Bessie. All except Bessie are to receive under the terms of the will fixed monthly amounts payable out of income. One may suspect that the inclusion of Bessie's name in paragraph 11 was somehow an inadvertence or mistake. It introduces confusion into the will. But it does not convince us that the testator intended to revoke the provision so plainly set forth in paragraph 7 that his daughter, the only child of his mentioned in the will, should receive as of right $12,000 a year, even if part of it had to be paid out of principal. If a paragraph as difficult of interpretation as paragraph 11 can fairly be called repugnant to paragraph 7, the repugnancy is not such as completely to obscure the testator's intention in favor of his daughter manifest from other parts of the will. See Crowell v. Chapman, 257 Mass. 492, 495, 154 N. E. 397; Bramley v. White, 281 Mass. 343, 349, 183 N. E. 761. The position of paragraph 11 as coming later in the will than paragraph 7 is not controlling under these circumstances. Mills v. Blakelin, 307 Mass. 542, 547, 30 N. E. 2d 873; Taylor v. Albree, 309 Mass. 248, 253-256, 258.

We have not overlooked the further contention in behalf of the remaindermen that the provisions of the will relative to the permissible retention of the testator's investment in Hewes and Potter Incorporated have some tendency to show that the trustees were not to be required to make payments to Bessie out of principal. But these provisions were not mandatory and are of very little weight in construing the donative part of the will.

The decree is reversed, and a decree is to be entered instructing the trustees that they are bound to pay from the principal to Bessie C. Hewes for any year after the "first year" that the net income payable to her is less than $12,000 a sum sufficient to make the sum received by her equal to $12,000, and that they are bound to dispose of the remaining assets and of the stock in Hewes and Potter Incorporated in so far as necessary to meet such payments, using sound judgment as to what to dispose of, and making proper effort to sell to the best advantage.

MEMORANDUM INEFFECTIVE TO CANCEL NOTE WITHOUT PAYMENT ON DEATH OF PAYEE

In re Carys Estate, Supreme Court, Appellate Division, 33 N. Y. Supp. (2d) 232

The payee of a note executed a memorandum directing that in case of her death the note "shall be considered cancelled and no money collected on it." The memorandum, however, was not executed with the formalities required of a will and therefore was held to be ineffective as a forgiveness of the debt conditional on the payee's death. Moreover, the evidence was insufficient to establish a contract between the debtor and the decedent since the acts claimed by the debtor to constitute performance of the contract were acts of kindness by himself and his wife which, in view of the friendship of the parties and other circumstances, were consistent with a non-contractual relation.

Proceedings in the matter of the estate of Elisabeth Luther Cary, deceased, by Roger M. Haviland and Brooklyn Trust Company, executors, to render and settle their account, wherein the claim of Roger M. Haviland, individually, to have a note canceled without payment was opposed by the executors and others referred to a referee. From an order of the Kings County Surrogate's Court, confirming referee's report and severing from the balance of the proceeding the issues tried before the referee and from a decree of such court, settling the account of the executors, Roger M. Haviland, individually, appeals.

Affirmed.

Arthur Donn, of Brooklyn (Leonard N. Snedeker, of Brooklyn, on the brief), for appellant.

William K. Allison, of Brooklyn (Joseph K. Ryan, of Brooklyn, on the brief), for respondent Brooklyn Trust Co.

William M. Winans, of Brooklyn, for respondent Harald John Lagergren, Jr., and others.

TAYLOR, J.—The appeal from parts of the decree presents for review a claim made by appellant against the estate of testatrix, which claim was tried and rejected upon the accounting of the executors.

The sole question here relates to the validity of the said claim, which, in substance, is that the appellant, by virtue of a contract between him and the testatrix, partly written and partly oral, is entitled to the cancellation without payment, as of the date of the death of the testatrix in 1936, of a concededly valid promissory note executed by him to her,

NOTE—For similar decisions see Banking Law Journal Digest (Fifth Edition) §1216.

in the sum of $5,000, dated May 21, 1925, payable in ten years, without interest. The decree, so far as it is under review, in effect compels the payment of the note by the appellant.

The sum of $5,000 was advanced by the testatrix to the appellant and was used by him in the purchase of eighty-eight shares of the common stock of a corporation owning a co-operative apartment house. Appellant's certificate of stock was deposited by him with the testatrix as collateral security for the payment of the note.

The testatrix was a business woman. She left a net estate approximating $300,000.

On May 21, 1925, the appellant executed and delivered to the testatrix such promissory note. It read:

"$5,000.00 May 21st 1925
"Ten years after date I promise to pay to Elisabeth L. Cary Five Thousand and no/100 Dollars without interest at 160 Henry St. Brooklyn, N. Y.
"Value received
"No. Due 5/21/1935
"R. M. Haviland"

It superseded a less formal note dated May 18, 1925, on which day the testatrix executed in duplicate a paper writing which read:

"E. L. Cary
"160 Henry Street
"Brooklyn, N. Y.
"In case of my death before note for $5000 (five thousand dollars) signed by Roger M. Haviland is paid, said note shall be considered cancelled and no money collected on it.
"Elisabeth Luther Cary
"May 18th 1925
"Witnessed by
"Ann M. Jones"

The duplicate was delivered to the appellant. The original of this paper and the note were found in testatrix's safe deposit box in an envelope, after her death. They were part of the same transaction. The envelope was endorsed by testatrix as follows:

"Brooklyn City Safe Deposit Co.
"Note of Roger Haviland
"for $5000
"and cancellation in case of my
"death
"E. L. Cary"

The certificate of stock, thus deposited as security, was also found in the same box.

The referee disallowed appellant's contention as to the effect of the instrument purportedly of cancellation as of the date of testatrix's

death, in effect on three grounds: (1) That as an attempt to cancel the note was conditioned to take effect only upon the testatrix's death and was not an absolute and unconditional renunciation of her rights in the note, it was inefficient to cancel it (citing Leask v. Dew, 102 App. Div. 529, 92 N. Y. S. 891, affirmed 184 N. Y. 599, 77 N. E. 1190; and Dimon v. Keery, 54 App. Div. 318, 66 N. Y. S. 817); (2) that the purported cancellation, to take effect only upon testatrix's death, was a forgiveness of the debt by an attempted testamentary disposition which failed because of lack of testamentary formalities required by Decedent Estate Law, section 21 (citing McCarthy v. Pieret, 281 N. Y. 407, 24 N. E. 2d 102; and Butler v. Sherwood, 196 App. Div. 603, 188 N. Y. S. 242); and (3) that if the instrument were treated as testamentary in character it was revoked in testatrix's will executed subsequently. Neither the referee's report nor the decree confirming it, in express terms passes upon the question of the existence of the pleaded contract. In each, however, is implicit a ruling that no such contract was made. We agree with the learned Surrogate and the learned referee that the appellant was not entitled to the cancellation of the note.

Appellant does not challenge the correctness of the several theses of the referee, as above set forth. He relies solely upon the contention, in effect, that the evidence requires a finding that a valid contract, evidenced by the original and duplicate memorandum dated May 18, 1925, existed between testatrix to such cancellation of the note upon testatrix's death. His counsel states: "The case turns simply upon the question of whether the instrument of cancellation was or was not part of a contract made between the parties."

Reduced to its lowest terms, the evidence in the record is as follows: Miss Cary, the testatrix, in 1925, was on cordial and friendly terms with the appellant, Mr. Haviland, and his wife, who then resided in Third Place, Brooklyn. Miss Cary, then fifty-five years of age, resided in apartment 6-C in the co-operative apartment building 160 Henry Street, Brooklyn, with an elderly and invalid friend, a Miss Jones, who was the appellant's aunt. Miss Cary's business made it necessary for her to take frequent trips out of town. It was a matter of concern to her that on such occasions she was obliged to leave the invalid Miss Jones alone. She was desirous, therefore, of having the Havilands in the same apartment building, in which an apartment 2-B was available for sale. Ultimately Mr. Haviland, the appellant, purchased that apartment for $5,000, which was advanced to him by the testatrix upon his note and security, under the circumstances above indicated. The Havilands still occupy apartment 2-B. Miss Cary and Miss Jones together continued to occupy apartment 6-C until Miss Jones' death in 1929. Miss Cary continued to occupy it until her own death in 1936. After 1925 appellant and his wife saw Miss Cary more frequently than when they were living on

Third Place. When Miss Cary was out of town they bore Miss Jones company. When Miss Cary had overnight guests, the Havilands gave her the use of their guest-room in apartment 2-B.

It is claimed by the appellant that these acts of kindness to Miss Cary and to Miss Jones were done pursuant to a contract by the terms of which the appellant's note was to be canceled at testatrix's death, in accordance with the terms of the memorandum (supra) signed by Miss Cary. The evidence, in our opinion, is wholly insufficient to establish that such a contract existed. There is simply no proof that the memorandum was part of any contract. The acts of the appellant and his wife, claimed to constitute performance of a contract, are consistent with a non-contractual relation, particularly in view of a loan of $5,000 by the testatrix to the appellant on terms so advantageous to him, the friendship of the parties, and the significant failure of the testatrix to write anything suggesting the existence of a contract. The appellant has failed to sustain the burden of proof upon him (McKeon v. Van Slyck, 223 N. Y. 392, 119 N. E. 851) to establish that such contract existed.

VIOLATION OF SMALL LOANS ACT

McGoldrick v. Family Finance Corporation, Court of Appeals of New York, 41 N. E. Rep. (2d) 86

Plaintiff borrowed $100 from a licensed lender in New York. Subsequently plaintiff signed a note as co-maker for the accommodation of husband and wife to enable them to borrow money from the same licensed lender. It was held that the latter transaction constituted a "contract of loan" under which plaintiff assumed an unconditional obligation to pay a loan within the Small Loans Act provision prohibiting any licensed lender from permitting any borrower to be indebted to him under more than one contract of loan at the same time. Hence, lender violated Small Loans Act in permitting plaintiff to become or remain indebted to it under a contract of loan to plaintiff and at the same time under contract of loan to husband and wife.

Action by Katherine McGoldrick against the Family Finance Corporation to compel defendant to cancel and surrender certain notes and wage assignments. From a judgment of the Appellate Division of the Supreme Court in the First Judicial Department, entered June 19, 1941, 262 App. Div. 720, 28 N. Y. S. 2d 709, unanimously affirming a judgment in favor of plaintiff entered upon an order of the court at

NOTE—For similar decisions see Banking Law Journal Digest (Fifth Edition) §§822-827.

Special Term, Benvenga, J., which granted a motion by plaintiff for judgment on the pleadings, 174 Misc. 971, 22 N. Y. S. 2d 186, defendant appeals by permission, a motion for leave to appeal having been denied by the Appellate Division, 262 App. Div. 833, 29 N. Y. S. 2d 144.

Affirmed.

Julius Winn, of New York City, for appellant.

William H. Schreiber and Samuel Lander, both of New York City, for respondent.

LEHMAN, C. J.—The defendant corporation is engaged in "the business of making loans of money, credit, goods, or things in action in the amount or of the value of three hundred dollars or less. . . ." It has obtained a license from the Superintendent of Banks in accordance with the provisions of article IX of the Banking Law, Consol. Laws, ch. 2, and it may charge, contract for and receive interest "not exceeding three per centum per month on any part of the unpaid principal balance of the loan not in excess of one hundred and fifty dollars and two and one-half per centum per month on any remainder of the unpaid principal balance of the loan." § 352. To protect borrowers against devices calculated to thwart the purpose of the restriction upon the interest it may charge, the same section provided: "No licensee shall induce or permit any borrower or borrowers to split up or divide any loan or loans, nor shall any licensee permit any borrower, nor any husband and wife individually or together, to be indebted to him under more than one contract of loan at the same time."

In June, 1938, the plaintiff borrowed from the defendant the sum of $100. As security for the loan the plaintiff executed and delivered an assignment of her wages to the defendant. In September, 1938, while the sum of $85 remained unpaid upon the loan, the defendant loaned the sum of $180 to one James J. Golden and his wife, Margaret Golden, and received a note for that amount, signed by them and by this plaintiff as comaker, which, among other things, provided that "we, the undersigned, jointly and severally, promise to pay to the order of Family Finance Corporation . . . One Hundred Eighty Dollars," and that "the undersigned acknowledges receipt of a loan in the amount of $180 from Family Finance Corporation." The plaintiff at the same time executed and delivered to the defendant another assignment of her wages as security for her obligation under the note which she signed for the accommodation of the borrowers.

Thereafter the loan of $100 to the plaintiff was increased to the sum of $140 and a note was executed by the plaintiff for that amount. At that time the loan to James J. Golden and his wife had been reduced and the total of the loan made to them and the loan to the plaintiff has at all times been under the sum of $300. In February, 1940, after default in payment of the note which the plaintiff had signed as co-

maker for the accommodation of the Goldens, the defendant filed with plaintiff's employer the wage assignment executed by the plaintiff to secure her obligation upon that note. The wage assignment given by the plaintiff to secure repayment of the loan made to her has never been filed.

The Banking Law provides that the violation of the provisions of specified sections of the statute, including section 352, shall constitute a misdemeanor and that "any contract of loan not invalid for any other reason, in the making or collection of which any act shall have been done which constitutes a misdemeanor under this section, shall be void and the lender shall have no right to collect or receive any principal, interest, or charges whatsoever." § 358. The plaintiff, claiming that the defendant was guilty of a misdemeanor when it made the loan in September, 1938, evidenced by the note which the plaintiff signed as co-maker while the plaintiff remained indebted to the defendant upon the loan made to her in June of that year, and thereafter was again guilty of misdemeanor when the loan made to her in June was "refinanced" or increased to the sum of $140 while she remained indebted to the defendant upon the note she signed as co-maker, has brought an action to compel the defendant to cancel and surrender the notes and wage assignments given in connection with such violations. After the answer was filed, judgment in favor of the plaintiff was granted upon the plaintiff's motion.

The note which the plaintiff signed as co-maker for the accommodation of James J. Golden and his wife in order to enable them to borrow money from the defendant, constitutes, it is clear, a "contract of loan" and under that contract the plaintiff assumed an unconditional obligation to pay the loan. Though the relationship between an accommodation party to an instrument and the person accommodated may be analogous to that of principal and surety, an accommodation maker is liable to a holder for value of the instrument in accordance with the terms of the instrument, unaffected by the fact that the consideration for the making of the instrument was paid to another. Negotiable Instruments Law, § 55, Consol. Laws, ch. 38. Under the contract embodied in the note the plaintiff assumed the liability of a principal, not the liability of a surety. National Citizens' Bank of City of New York v. Toplitz, 81 App. Div. 593, 81 N. Y. S. 422, affirmed, but on a different ground, 178 N. Y. 464, 71 N. E. 1. It follows that the defendant violated the provisions of section 352 of the Banking Law when it permitted the plaintiff to become or remain indebted to it under the contract of loan made to the plaintiff and at the same time under the contract of loan to the Goldens, which the plaintiff agreed to pay by signing the note as a co-maker for the borrowers. See Westville & Hamden Loan Co. v. Pasqual, 109 Conn. 110, 145 A. 758. Possible doubt as to the

nature and effect of the contract of loan evidenced by the note signed by the plaintiff as co-maker and secured by the assignment of her wages, would be removed by the provisions of section 355 of the statute. The plain language of the statute cannot be changed by any administrative ruling. Nor can the courts grant exemption from the penalty imposed by the statute.

TIME OF ACQUIRING DEMAND NOTE

Johnson v. Campanella, Appellate Court of Illinois, 40 N. E. Rep. (2d) 905

What constitutes a reasonable time for transfer of demand note in determining whether transferee becomes a holder in due course is a question of fact for the jury.

In this case a demand note executed June 29, 1939, was transferred during the last few days of January, 1940, to plaintiff as additional security for payment of an indebtedness of payee to the plaintiff. It was held that whether a reasonable time had elapsed at time of transfer, so that plaintiff did not become a holder in due course was a question of fact for the jury.

Action by Joe Blalack against Ben Campanella on a demand note. After judgment was entered by confession, the court permitted the case to be reopened and tried on its merits. After institution of suit and reopening of case, G. W. Johnson was substituted as plaintiff. From an adverse judgment, defendant appeals.

Affirmed.

Harold N. Harrison, of Benton, and Hugh V. McMurray, Jr., and Lester R. Carlson, both of Centralia, for appellant.

Ward P. Holt and John B. Kramer, both of Salem, for appellee.

STONE, P. J.—The original suit herein was filed in the Circuit Court of Marion County, as a narr and cognovit action, by Joe Blalack, asking for a judgment in the sum of $6,946.50 against Ben Campanella, appellant (hereafter designated as defendant), on a demand note, dated June 29, 1939, for $6,000, executed by Ben Campanella to A. F. Grone, as payee, which note was endorsed by said Grohe and delivered to G. W. Johnson, appellee (hereinafter designated as plaintiff). After judgment was entered by confession, on motion of the defendant, the Court permitted the case to be reopened and tried on its merits. After the institution of the suit and the reopening of the case, G. W. Johnson, having reacquired the note, was substituted as plaintiff.

NOTE — For similar decisions see Banking Law Journal Digest (Fifth Edition) §642.

The case was tried before a jury which returned a verdict of $6,570. Judgment was entered thereon and this appeal followed.

Plaintiff's theory of this case, as evidenced by the testimony of G. W. Johnson, was that plaintiff acting as the attorney in fact for R. E. Davis, acquired a lease upon a piece of ground known as the Chitwood strip for approximately $20,000 and thereafter assigned a three-eighths interest in the lease to A. F. Grohe in exchange for which Grohe agreed to pay him $15,000, and agreed to drill an oil well on the leasehold. Thereafter Grohe assigned an undivided one-eighth interest in the lease to Ben Campanella, for which Campanella paid Grohe $6,000 in cash and made and executed a demand note in the sum of $6,000 and delivered same to Grohe.

Johnson and Grohe had purchased some leases near Keensburg, Illinois, upon which Grohe was indebted to Johnson in the sum of $10,000. Several notes were made by A. F. Grohe to Johnson and renewed, but never paid. Upon Johnson pressing Grohe for payment of this $10,000 indebtedness, Grohe asked him for additional time and gave Johnson the $6,000 demand note as additional security for the payment of his indebtedness of $10,000. This note was transferred to plaintiff, the last few days in January, 1940, and was dated June 29, 1939.

Defendant's theory was that at the time Campanella executed the note involved in this suit, Grohe signed and gave to Campanella a letter acknowledging that there was to be no liability on the note until Grohe had completed a well on the Chitwood strip. No well was completed there and it is claimed that when, after the lapse of some six months Grohe endorsed the note and delivered it to plaintiff, that Johnson had full knowledge of the circumstances under which the note was delivered, and did not become a holder in due course thereof, and hence was not entitled to recover on the note.

It is the contention of counsel for defendant that plaintiff could not be held to be a holder in due course for the reason that the note was a demand note and was negotiated an unreasonable length of time after its issue; that as a matter of law, from the facts and circumstances Grohe and Johnson were partners and all knowledge that Grohe had in relation to the note including the defenses to which the note was subject, must be imputed to Johnson.

Section 53 of the Negotiable Instruments Law (Ill. Rev. Stats. 1939, ch. 98, par. 73, Jones Ill. Stats. Ann. 89.073) provides: "Where an instrument payable on demand is negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course," Section 192 (Ill. Rev. Stats. 1939, ch. 98, par. 215; Jones Ill. Stats. Ann. 89.215 of the same act provides: "In determining what is a 'reasonable time' or an 'unreasonable time' regard is to be had to the nature

of the instrument, the usage of trade or business (if any), with respect to such instruments, and the facts of the particular case." Counsel for defendant contend that it should be the judgment of the Court that as a matter of law, in the absence of special circumstances, the negotiation of an instrument payable on demand more than six months from the date of its issue be regarded as a negotiation an unreasonable length of time after its issue, so that the taker of the instrument cannot be regarded as a holder in due course. Counsel for plaintiff insists that it is a question of fact for the jury.

It is a well-established principle of law in this state that what is a reasonable length of time is a question of fact for the jury. Nagle v. J. L. Hanson Co., 262 Ill. App. 160; Jefferson T. & S. Bank v. W. Heller & Son, 305 Ill. App. 644, 27 N. E. 2d 844, 849. In the latter case which is cited by defendant, the court said, "There is no precise time when as a matter of law a demand note should be deemed to be dishonored. Under the evidence found in this record, we are unable to say that the jury were not warranted in finding that a reasonable time had elapsed at the time appellant became the owner of the original note and therefore not a holder in due course."

In re Philpott's Estate, 169 Iowa 555, 151 N. W. 825, Ann. Cas. 1917B, 839, it was held that whether a demand note had been negotiated an unreasonable time after issue so that the holder was not one in due course, is a question for the jury. To the same effect is the holding of the Supreme Court of Connecticut in Tomlinson Carriage Co. v. Kinsella, 31 Conn. 268. The general proposition of whether or not plaintiff was a holder in due course was a question for the consideration of the jury. Renfrow v. Kramer, 341 Ill. 398, 173 N. E. 390; Foncannon v. Lewis, 327 Ill. 455, 159 N. E. 35.

Correlated to the proposition, as to whether or not plaintiff took the note without notice of the agreement between Campanella and Grohe, is the question of a partnership existing between plaintiff and Grohe, for a principal is chargeable with and is bound by the knowledge of, or notice to, his agent received while the agent is acting within the scope of his authority and which is in reference to a matter over which his authority extended. United States Cold Storage Co. v. Central Mfg. Dist. Bank, 343 Ill. 503, 175 N. E. 825, 74 A. L. R. 811; Mullanphy Savings Bank v. Schott, 135 Ill. 655, 26 N. E. 640, 25 Am. St. Rep. 401; Stimpson Computing Scale Co. v. Ehmsen, 246 Ill. App. 271. A partnership may be established, if there be no written agreement, by the conduct and declarations of the parties. The State National Bank of Springfield v. Butler, 149 Ill. 575, 36 N. E. 1000. However, whether a partnership has been established by an oral agreement or by conduct of the parties is a question of fact. Fitch v. King, 279 Ill. 62, 116 N. E. 624; Field et al. v. Crawford et al., 146 Ill. 136, 34 N. E. 481. In the instant

case these questions were properly submitted to the jury, there being no error assigned as to instructions, and under all the facts and circumstances as shown by this record, we do not feel that the finding should be disturbed. The Court did not err in refusing to direct a verdict for defendant.

We find no reversible error in the admission or rejection of testimony, as complained of by defendant. The trial court might well have sustained the objection to some of the testimony of plaintiff, as to conversation between him and Malan of the City National Bank, and as to information imparted to Malan by the banker at the Steeleville Bank, as hearsay, but we do not regard the admission of this testimony as sufficiently prejudicial to justify a reversal of this cause upon that ground alone. In our opinion while this record is not entirely free from errors, there was no reversible error committed by the trial court in the admission or rejection of evidence.

The jury saw and heard the witnesses, were in a position to observe their demeanor and conduct while upon the witness stand, and to judge of their credibility. The controverted questions in this case were questions of fact for the determination of the jury. By their verdict the jury determined those issues in favor of the plaintiff, and we are not inclined to hold that their finding was contrary to the manifest weight of the evidence. Where a fair question of fact is raised by the proof, an appellate court will not set aside the jury's finding as being against the manifest weight of the evidence. Summers v. Hendricks, 300 Ill. App. 498, 21 N. E. 2d 635; Jones v. Esenberg, 299 Ill. App. 551, 20 N. E. 2d 906; Gregory v. Merriam, 294 Ill. App. 483, 14 N. E. 2d 268.

Finding no reversible error, the judgment of the trial court will be affirmed.

LEGAL QUERIES AND ANSWERS

By JOSEPH A. NOBILE *of the Massachusetts Bar*

Accommodation Paper

Q. A partner, without being authorized by the other member of the firm, signed the firm name on a note for accommodation. The note was negotiated to one who received it with knowledge of the accommodation character of the firm's indorsement. Can he hold the firm liable on the note?

A. No. A partner has no implied authority to execute accommodation paper in the name of the firm. Hendrie v. Berkowitz, 37 Cal. 113. 37 B. L. J. 351. § 33 B. L. J. Digest.

Certificate of Deposit

Q. Is a bank liable on certificates of deposit wrongfully issued by the cashier of the bank, payable to his own order?

A. No. Where a cashier issues a certificate to himself without authority the purchaser cannot recover thereon. The fact that the certificate is payable to the cashier is notice that it may have been issued wrongfully. Lee v. Smith, 84 Mo. 304. 18 B. L. J. 898; 37 B. L. J. 752. § 242 B. L. J. Digest.

Consideration

Q. When the holder of a negotiable instrument brings action on it must he prove that value or consideration was given for it?

A. No. There is a presumption that the instrument was issued for a valuable consideration. The burden is on the party sued to show that no consideration was in fact given. N. I. L., Sec. 24.

Delivery

Q. "A" signs a note payable to "B," intending to give it to "B" in payment for certain goods, which "B" has delivered to "A." "B" takes the note from "A's" desk without "A's" knowledge or consent. "B" then sells the note to "C." Can "C" enforce the note against "A"?

A. Yes, if "C" purchased the note for value, before maturity, and without notice of the circumstances under which "B" obtained the note. Under the Negotiable Instruments Law, where an instrument is

in the hands of a holder in due course, a valid delivery thereof by all parties prior to him, so as to make them liable to them is conclusively presumed. N. I. L., Sec. 16.

Holder in Due Course

Q. A bank credited a depositor's account with a check drawn by "A" on another bank, and then accepted and paid several checks drawn by the depositor at a time when his account was insufficient to pay same unless he was credited with "A's" check. Did the bank of deposit become a holder in due course of "A's" check?

A. Yes. Bank of deposit became a holder in due course of "A's" check and when payment was stopped thereon could recover the full amount from "A." Bank of America v. Universal Finance Co., 21 Pac. (2d) 147. 131 Cal. App. 116.

Q. Where the purchaser of a note paid only one-third of its face value for it, is he a holder in due course?

A. It has been held that this fact of itself is not enough to show the purchaser is not a holder in due course. Ham v. Merritt, Ky., 149 S. W. Rep. 1131. 29 B. L. J. 1020; 37 B. L. J. 520. § 648 B. L. J. Digest.

Indorsement and Transfer

Q. A note payable to bearer is indorsed by the holder to the order of "A." If "A" sells the note is his indorsement necessary to the transfer?

A. No. Where an instrument payable to bearer is indorsed specially it may nevertheless be further negotiated by delivery. N. I. L., Sec. 40.

Q. A note payable to bearer is indorsed by the holder to the order of "A." "A" transfers the note to "B" without indorsement. What are "B's" rights against the indorser?

A. While "B" may enforce the note against the maker he has no rights as against the indorser. In such a case the indorser is liable only to such holders as take title through his indorsement. N. I. L., Sec. 40.

Negotiability

Q. Is a note which contains the following statement negotiable: "This note is payable when Post Office Department accepts my building from me"?

A. The note is conditional as to payment and not negotiable. Devine v. Price, 152 N. Y. Supp. 321. 32 B. L. J. 395; 37 B. L. J. 256. § 947 B. L. J. Digest.

Q. Is the validity or negotiability of a note affected by the fact that it bears no date?

A. No. Where an instrument is undated it is regarded as being dated as of the day on which it was issued. N. I. L., Sec. 6, 17.

Notice of Dishonor

Q. The holder and indorser of a dishonored instrument reside in the same place. Within what time must notice be served, if given at the indorser's residence?

A. Before the usual hours of rest on the day following the dishonor. N. I. L., Sec. 103.

Payment

Q. A depositor has two accounts in a bank. He authorizes an agent to draw checks against one of the accounts. Is the bank protected in paying a check drawn by the agent out of the other account?

A. No. Hiller v. Bank of Columbia, S. C., 75 S. E. Rep. 789. 32 B. L. J. 125, 402. § 1241 B. L. J. Digest.

Presentment for Acceptance

Q. A bill of exchange is payable 30 days after date. Is presentment for acceptance necessary?

A. No. Presentment for payment at maturity is sufficient. N. I. L., Sec. 143.

Presentment for Payment

Q. What persons are primarily liable on a negotiable instrument?

A. Any person who by the terms of the instrument is absolutely required to pay, the maker of a note, and the acceptor of a bill of exchange. N. I. L., Sec. 192.

Stopping Payment

Q. After a depositor had stopped payment of a check he sent a letter to the bank canceling the order. The bank returned this order because it was not properly signed. The bank subsequently paid the check. Is it liable to the drawer?

A. Inasmuch as the order to stop payment had not been canceled it still stood, and the bank is liable to the depositor. American Defense Society v. Sherman Nat. Bank, 162 N. Y. 1081. 34 B. L. J. 167; 36 B. L. J. 355. § 1466 B. L. J. Digest.

Judicial Trends

Digest of Decisions on Forged Paper

Forgery by Agent or Employee of True Owner

The plaintiff company filed with the defendant bank a statement authorizing certain officers to sign its corporate name. Two of the plaintiff's employees forged indorsements on checks payable to the plaintiff and cashed them at the defendant bank, in which the plaintiff kept its account. It was held that the bank was liable to the plaintiff for the amount of its loss. Amerton Hotel Corp. v. National City Bank of New York, 239 N. Y. Supp. 595. 47 B. L. J. 455.

A complaint alleging that the defendant bank came into possession of the money sued for, or checks representing that money, by the indorsement of a person receiving them by virtue of his employment by a representative of the plaintiff's assignor for the sale of its products in a specified territory, sets out a cause of action against the defendant bank. Commercial Casualty Ins. Co. v. Isbell Nat. Bank, Ala., 124 So. Rep. 413. 47 B. L. J. 304.

Where a person having power of attorney authorizing him to indorse and collect a certain draft indorsed and collected a check given in payment of the original draft it was held that he had no authority to do so and the collecting bank was held liable to the payee on the ground that it had collected the check on a forged indorsement. Jennings v. President and Directors of the Manhattan Company, N. Y., 197 N. Y. Supp. 401. 40 B. L. J. 265.

A state warrant, drawn on the State Treasurer, was wrongfully taken by a state employee, who forged the payee's indorsement and deposited it to his credit in the A Bank. This bank indorsed it generally and sent it to the B Bank, which collected it from the State Treasurer. In an action by the State against both banks it was held that both were liable and that if the B Bank were required to pay it could recover from the A Bank. State v. Merchants' National Bank, Minn., 177 N. W. Rep. 135. 37 B. L. J. 307.

Where a clerk, authorized to indorse checks "for deposit" with a rubber stamp, wrongfully indorsed certain checks in blank and deposited them to his own credit in the defendant bank, afterwards drawing out and using the proceeds, it was held that the defendant was liable to the principal. Schmidt v. Garfield Bank, 64 Hun (N. Y.) 298, aff'd in 138 N. Y. 631. 7 B. L. J. 361.

An employee of a mill company, instead of depositing checks sent to the company, had them cashed without authority at the bank and appropriated the proceeds. These checks were not entered in the company's books when received, this matter being in charge of the same employee. In some instances he used the proceeds of one check to cover former defalcations. The company ascertained the extent of the fraud by writing to its customers. It was held that the company was not negligent in failing to discover the embezzlement and notify the bank, and that the bank was responsible for the loss. National Bank of Commerce v. Tacoma Mill Co., 104 A. C. C. 441, 182 Fed. Rep. 1. 28 B. L. J. 25; 32 B. L. J. 181.

A collector employed by the plaintiff wrongfully indorsed checks received from the plaintiff's debtors with the plaintiff's name, adding thereto "Per E. H. Slates." Some of these he cashed at the defendant bank and others he cashed at other banks which sent them to the defendant for collection. The defendant collected all of the checks from the drawees thereof. The agent absconded with the proceeds. It was held that the fact that the agent had authority to make collections in the form of checks did not constitute authority to indorse them, and that the defendant was liable to the plaintiff for the amount of the checks thus wrongfully indorsed by the agent. Schaap v. State Nat. Bank, Ark., 208 S. W. Rep. 309. 36 B. L. J. 259.

Where an employee forged his employer's indorsement on checks payable to the latter and negotiated them through the defendant bank, the defendant bank was held liable to the employer. The fact that the employee had authority to indorse for deposit did not alter the situation. Rosenberg v. Germania Bank, 44 Misc. Rep. (N. Y.) 233, 88 N. Y. Supp. 952. 21 B. L. J. 608.

The plaintiff's stenographer was authorized to indorse checks, payable to the plaintiff, for deposit by means of a rubber stamp. She indorsed certain checks in her own handwriting, collected them and kept the proceeds. The checks were collected through the defendant bank. It was held that the defendant was liable to the plaintiff. Standard Steam Specialty Co. v. Corn Exchange Bank, N. Y., 116 N. E. Rep. 386. 34 B. L. J. 493.

The plaintiff's agent indorsed the plaintiff's name on a check payable to the plaintiff, collected the proceeds through the defendant bank and used them personally. It was held that the bank was liable for the amount. Hope Vacuum Cleaner Co. v. Commercial National Bank, Kans., 168 Pac. Rep. 870. 35 B. L. J. 201.

A bank which cashed a check payable to a corporation and indorsed by the bookkeeper of the corporation, without authority, in the corporation's name, payable to his own order, and collected the check from the drawee was held liable for the conversion of the check. First Nat. Bank v. Montgomery Cotton Manufacturing Co., Ala., 101 So. Rep. 186. 41 B. L. J. 800.

Where an employee, authorized to indorse checks payable to his employer for deposit, indorses them in blank, deposits them in his bank by which they are collected and appropriates the proceeds, the collecting bank is liable to the employer for the amount of the checks. Strong v. Missouri Lincoln Trust Co., Mo., 263 S. W. Rep. 1038. 41 B. L. J. 880.

The secretary of an association authorized to make collections for it received a number of checks payable to the association's order. Without authority, he indorsed the association's name on the checks and cashed them at a hotel. The hotel deposited them in the defendant bank and the latter collected them from the banks on which they were drawn. In this action, it was held that the defendant bank was liable to the association for the amount of the checks. Independent Oil Men's Association v. Fort Dearborn National Bank, Ill., 142 N. E. Rep. 558. 41 B. L. J. 333.

The Miller Rubber Co. opened an account in its name in the defendant bank, and arranged with the bank that checks, payable to the company, received by its distributing agents in Baltimore, should be deposited in this account by the agents. No one had authority to draw against this account except the company. The agents wrongfully indorsed checks payable to the company's order, and deposited them in their individual account, appropriating the proceeds. It was held that the bank was liable to the company for the amount of its loss. National Union Bank v. Miller Rubber Co., Md., 129 Atl. Rep. 688. 42 B. L. J. 700.

The manager of a branch of the plaintiff company, although unauthorized to indorse checks on behalf of the company, indorsed a cashier's check payable to the company's order and the defendant bank cashed it and collected it from the bank which had issued it. The defendant was held liable for the amount of the check. Good Roads Machinery Co. v. Broadway Bank, Mo., 267 S. W. Rep. 40. 42 B. L. J. 360.

The agent of an insurance company, charged with the duty of delivering a check to the payee, procured another person to impersonate the payee, and introduced him to a bank which paid the check on his forged indorsement. It was held that, as between the insurance company and the bank, the latter must bear the loss. First National Bank v. Guaranty Life Insurance Co., Ga., 164 S. E. Rep. 212. 49 B. L. J. 946.

A bank, which cashes checks drawn to the order of a corporation, on the unauthorized indorsements of an agent of the corporation, will be liable to the corporation for any amount misappropriated by the agent. Merchants' & Manufacturers' Assn. v. First National Bank, Ariz., 14 Pac. Rep. (2d) 717. 50 B. L. J. 297.

BOOK REVIEW

Your Legal and Business Matters and How to Take Care of Them. By Henry E. Ashmun. Published by The John Day Company, Inc., 2 West 45th St., New York, N. Y.

A small volume has just been published which will be of special interest to professional and businessmen who are constantly asked for advice on legal affairs which their particular training does not make them competent to give. The book is "Your Legal and Business Matters and How to Take Care of Them," by Henry E. Ashmun, practicing attorney and former special secretary to the Supreme Court of California.

Mr. Ashmun covers the whole ground of ordinary transactions such as outlawing of debts, filing of a will, protection of investments, choice of insurance, purchase of a home, examination of deeds, and installment buying in which the layman frequently pays a tragic and unnecessary price for his ignorance.

Instead of analyzing specific laws, the author concentrates on the potential difficulties of these questions, warning those prone to be casually trustful and advising them in what types of dealings additional legal assistance is essential. The book is a John Day publication and is priced at $1.75.